TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 321

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1960
CERTIORARI GRANTED OCTOBER 24, 1960

INDEX.

PAGE

Charge against Labor Organization or its Agents (General Counsel's Exhibit 1-A) 1

Complaint and Notice of Hearing (General Counsel's Exhibit 1-C) 4

Answer (General Counsel's Exhibit 1-E) 9

Intermediate Report and Recommended Order 11

Statement of the Case 11

Findings of Fact 12

I. The business of the Company 12

II. The Respondent 13

III. The alleged unfair labor practices 13

A. "Appliance Park"; The Respondent's representative status; the issue 13

B. The Company's operations; its use of contractors 14

C. Restrictions upon the use of the 5 gates; the strike; the valid picketing of 4 gates; the allegedly invalid picketing at Gate 3A 16

D. Factual summary 19

E. The first issue: Is this a "common situs" case? 21

F. Are the Act's secondary boycott provisions applicable to the picketing at Gate 3A? 23

1. The Board cases 23

2. The Court cases 27

3. The General Counsel's contentions 29

4. The General Counsel's authorities 33

5. Conclusions 34

PAGE

Conclusions of Law 36
Recommendations 36
Appendix—Diagram showing the area of Gates 3 3A along Buechel Bank Road. Photostatic copy bound in opposite 36
Decision and Order 37
Stenographic Transcript of Testimony at Hearing of September 22, 1958 47
Motion to Amend Complaint 48
Stipulations 48, 95
Stipulation as to Testimony 67
Stenographic Transcript of Testimony at Hearing of September 23, 1958 132
Prehearing Conference Stipulation 191
Order 193

TESTIMONY.

Witnesses for General Counsel:

Means, Lester H.
Direct Examination 50, 57, 59
Cross Examination 58, 59
Re-direct Examination 65, 66

Gatton, John
Direct Examination 68
Cross Examination 72
Re-direct Examination 75

Tupuritis, Arnold
Direct Examination 77
Cross Examination 79

Comstock, Sylvester D.
Direct Examination 79, 95
Cross Examination 84, 99
Re-direct Examination 100

PAGE

Johnson, Benjamin Charles
Direct Examination 84
Lang, Richard J.
Direct Examination 86
Napier, James S.
Direct Examination 87
Cross Examination 89
Wilson, James F.
Direct Examination 89
Cross Examination 94
Terry, Mr. Lonnie
Direct Examination 101
Re-direct Examination 103
Walton, Lawrence
Direct Examination 104, 106
Cross Examination 107
Woods, McDonald
Direct Examination 108, 111
Re-cross Examination 111
Gatton, John
Direct Examination 112, 114
Cross Examination 114, 119
Re-direct Examination 119
Re-cross Examination 120
Re-called in rebuttal:
Direct Examination 165
Cross Examination 169
Weber, Robert H.
Direct Examination 120
Re-direct Examination 123, 126
Re-cross Examination 124, 126
Denton, Cecil S.
Direct Examination 127

PAGE

Goodfleisch, Wilber
Direct Examination 128
Cross Examination 130
Falk, David
Direct Examination 131

Witnesses for Respondent:
Johnson, John
Direct Examination 132
Cross Examination 139
Re-direct Examination 144
Re-cross Examination 145
Kost, Ray F.
Direct Examination 146
Cross Examination 147
Smith, Francis J.
Direct Examination 151
Cross Examination 152
Ferguson, Thomas C.
Direct Examination 155
Milby, Rudolph
Direct Examination 156
Cross Examination 157
Re-direct Examination 161
Re-cross Examination 162

EXHIBITS.

General Counsel's Exhibits:
Exhibits 1-A through 1-G—Documents. Received in evidence at page ....
Exhibit 1-A—Charge against Labor Organization or its Agents. Printed at 1
Exhibit 1-C—Complaint and Notice of Hearing. Printed at 4
Exhibit 1-E—Answer. Printed at 9

PAGE

Exhibit 2—Photograph of Gate Number 3-A at Appliance Park taken from a point north of said gate, facing south, and shows the entrance onto Buechel Bank Road. Received in evidence at page .... Bound in opposite 170

Exhibit 3—Plot Plan of Appliance Park. Received in evidence at page ..... Photostatic copy bound in opposite 170

Exhibit 4—Appliance Park Windshield Sticker Identification System—1957. Received in evidence at page .... Printed at 171

Exhibit 5—Plant Protection Bulletin #9—Appliance Park, Kentucky—January 20, 1954. Received in evidence at page .... Printed at 179

Exhibit 7—Plant Protection Bulletin #18—December 27, 1956. Received in evidence at page .... Printed at 187

Exhibit 8—General Conditions, Revised 1/10/58. Received in evidence at page .... Excerpt printed at 189

Exhibit 10—Picket Instructions. Received in evidence at page .... Printed at 189

	Original	Print
Proceedings in United States Court of Appeals for the District of Columbia Circuit	194	194
Opinion, Danaher, J.	194	194
Order granting enforcement of order of NLRB	202	200
Judgment	203	201
Clerk's certificate (omitted in printing)	206	202
Excerpts from transcript of testimony of William Goodfleisch before the Trial Examiner of the National Labor Relations Board	207	203
Order extending time to file petition for writ of certiorari	213	205
Order allowing certiorari	214	206

General Counsel's Exhibit 1-A.

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

Charge Against Labor Organization or its Agents.

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS: File an original and 3 copies of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No.
9-CC-158

Date Filed
August 4, 1958 C. I. W.

Compliance Status Checked by:

1. Labor organization or its agents against which charge is brought

Name
Local 761, International Union of Electrical, Radio and Machine Workers (AFL-CIO)

Address
5153 Poplar Level Road, Louisville, Kentucky

The above-named organization(s) or its agents has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b) subsection(s) (4)(A) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.
(List subsections)

2. Basis of the charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about July 28, 1958, the above-named labor organization and officers, agents and employees thereof, has engaged or induced or encouraged employees of the following named contractors:

Ambrosius Construction Co., 2791 South Floyd St., Louisville, Ky.

Garst-Receveur Construction Co., 325 W. Ormsby Ave., Louisville, Ky.

General Counsel's Exhibit 1-A.

Wehr Constructors, Inc., 2127 South Floyd St., Louisville, Ky.
Service Erection & Machine Co., 3928 Bardstown Road, Louisville, Ky.

and employees of other employers, to engage in a concerted refusal in the course of their employment to use, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services for their respective employers, an object thereof being to force or require the above-named companies and other employers to cease doing business with the General Electric Company, and a further object thereof being to force or require the General Electric Company to cease doing business with the above-named companies and other employers.

3. Name of Employer
General Electric Company, Appliance and Television Receiver Division

4. Location of plant involved (Street, City, and State)
Appliance Park, Louisville 1, Kentucky

5. Type of establishment (Factory, mine, wholesaler, etc.)
Manufacturing establishment

6. Identify principal product or service
Automatic washers, dryers, ranges, dishwashers, Disposalls, Household refrigerators, freezers, room air conditioners.

7. No. of workers employed
10,000

8. Full name of party filing charge
General Electric Company, Appliance and Television Receiver Division

9. Address of party filing charge (Street, City, and State)
Appliance Park, Louisville 1, Kentucky.

General Counsel's Exhibit 1-A.

10. Tel. No.
GL 4-7511 Ext. 3164

11. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ L. H. MEANS
(Signature of representative or person making charge)
L. H. MEANS

August 4, 1958 (Date)

Manager—Relations and Utilities Department
(Title or office, if any)

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001)

General Counsel's Exhibit 1-C.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

NINTH REGION

—o—

In the Matter

of

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (AFL-CIO),

and

GENERAL ELECTRIC COMPANY, APPLIANCE AND TELEVISION RECEIVER DIVISION.

Case No. 9-CC-158.

—o—

COMPLAINT AND NOTICE OF HEARING.

A charge having been filed by General Electric Company, Appliance and Television Receiver Division, herein called General Electric, against Local 761, International Union of Electrical, Radio and Machine Workers (AFL-CIO), herein called Respondent, which charge has been duly served upon said Respondent, pursuant to Section 10(b) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, the General Counsel of the Board by the undersigned Regional Director, issues this complaint against the Respondent and alleges that:

General Counsel's Exhibit 1-C.

1. Now and at all times material herein the Respondent has been and is a labor organization as defined in Section 2(5) of the Act. Admit.

2. (a) Now and at all times material herein General Electric is and has been a New York corporation licensed to do business in the State of Kentucky where it maintains and operates offices and a manufacturing plant located at Appliance Park, Louisville 1, Kentucky, where it is engaged in the manufacture and sale of automatic washers, dryers, dishwashers and other household appliances and which plant is the only plant involved in this proceeding. Admit.

(b) During the calendar year 1957 General Electric sold and shipped from its aforesaid plant in Louisville, Kentucky directly to points located outside the State of Kentucky, goods of a value in excess of $10,000,000.00. Admit.

(c) Now and at all times material hereto General Electric is and has been engaged in "commerce" and in operations "affecting commerce" as defined in Section 2, subsections (6) and (7) of the Act. Admit.

3. (a) Wehr Contractors, Inc. is an employer located at 2127 South Floyd Street, Louisville, Kentucky, engaged in the general construction business and at the times material herein was doing business with General Electric. DKIB.

(b) Service Erection & Machine Co. located at 3928 Bardstown Road, Louisville, Kentucky is an employer engaged in the erection of conveyor systems and allied equip-

ment and at the times material herein was doing business with General Electric. DKIB

(c) R. J. Hefferman Electrical Contractor located at 917 South 17th Street, Louisville, Kentucky is an employer engaged in the electrical contracting business and at the times material hereto was doing business with General Electric. DKIB.

(d) Garst-Receveur Construction Company located at 325 West Ormsby Avenue, Louisville, Kentucky is an employer engaged in the general contracting business and at the times material hereto was doing business with General Electric. DKIB.

(e) Liberty Engineering and Manufacturing Company located at 1450 South 15th Street, Louisville, Kentucky is an employer engaged in the fabrication and installation of sheet metal and iron work and at the times material herein was doing business with General Electric. DKIB.

4. Commencing on or about July 28, 1958 and thereafter the Respondent by picketing an entrance to the aforesaid premises of General Electric known as Gate No: 3 A, which entrance is and has been reserved for and used exclusively by employers other than and employees of employers other than General Electric, and by direct appeal, induced and encouraged employees of Wehr Contractor, Inc., Service Erection & Machine Co., R. J. Hefferman Electrical Contractor, Garst-Receveur Construction Company and Liberty Engineering and Manufacturing Company and of other employers, whose names are unknown to the Regional Director, to engage in strikes or concerted refusals in the

course of their employment to use, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services with the purpose or object of: (a) forcing the above-named employers and other employers, whose names are unknown to the Regional Director, to cease doing business with General Electric, and or (b) forcing and requiring suppliers and materialmen, whose names are unknown to the Regional Director, to cease doing business with the employers, other than General Electric, named above. Denied.

5. By the acts and conduct alleged above and by each of said acts, the Respondent has engaged in and is engaging in unfair labor practices as defined in Section 8 (b) (4) (A) of the Act, "affecting commerce" as defined in Section 2, subsections (6) and (7) of the Act. Denied.

PLEASE TAKE NOTICE that on the 27th day of August, 1958, at 10:30 o'clock in the forenoon (CDST), in Court Room No. 1, United States Post Office Building, Louisville, Kentucky, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations of the foregoing Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to the Complaint within ten (10) days from the date of service thereof and that unless you do so all of the allegations in the Complaint

shall be deemed to be admitted to be true and shall be so found by the Board.

IN WITNESS WHEREOF, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Complaint and Notice of Hearing to be issued by the Regional Director for the Ninth Region this 11th day of August, 1958.

LLOYD R. FRAKER,
LLOYD R. FRAKER,
Acting Regional Director, Ninth Region,
National Labor Relations Board,
1200 Ingalls Building,
6 E. Fourth Street,
Cincinnati 2, Ohio.

General Counsel's Exhibit 1-E.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter
of
LOCAL 761 INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondent,
and
GENERAL ELECTRIC COMPANY APPLIANCE PARK.

Case 9 CC 158.

ANSWER.

COMES the Respondent and for its Answer states the following:

I) Admits the following paragraphs:
1, 2a; 2b, 2c.

II) Does not have sufficient knowledge to reply to the following paragraphs of the complaint:
preliminary paragraph, 3a, 3b, 3c, 3d, 3e.

III) Deny the allegations contained in the following paragraphs: 4, 5.

WHEREFORE THE RESPONDENTS having fully answered pray that the charges and complaint be dismissed.

/s/ HERBERT L. SEGAL,
Attorney for Respondents.

General Counsel's Exhibit 1-E.

I hereby certify that a copy of his answer was sent by regular mail this 20th day of Aug. '58 to the following:

National Labor Relations Bd.,
Washington 25, D. C.

W. J. Barron Counsel,
G E Appliance Park, Ky.

General Counsel,
Wm. R. Ringer,
NLRB,
Washington 25 D. C.

/s/ HERBERT L. SEGAL,
Attorney for Respondents.

Intermediate Report and Recommended Order.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

———o———

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (AFL-CIO),
and
GENERAL ELECTRIC COMPANY, APPLIANCE AND TELEVISION RECEIVER DIVISION.

———

Case No. 9-CC-158.

———o———

John H. Rogers, Esq. and John H. Arbuckle, Esq., of Cincinnati, Ohio, for the General Counsel.

Herbert L. Segal, Esq. and Mr. John Johnson, of Louisville, Ky., and Benjamin Sigal, Esq., of Washington, D. C., for the Respondent.

W. L. Clay, Jr., Esq. and William J. Barron, Esq., of Louisville, Ky., for the Company.

Trial Examiner: A. Bruce Hunt.

STATEMENT OF THE CASE

Upon the duly issued complaint of the General Counsel and the answer of the Respondent (Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO), a hearing in this matter was conducted by the undersigned Trial Examiner in Louisville, Kentucky, on Sep-

tember 22 and 23, 1958. The complaint alleges in substance, and the answer denies, that during July and August 1958 the Respondent violated Section 8 (b) (4) (A) of the Act by inducing and encouraging employees of employers other than General Electric Company, Louisville, Kentucky (herein called the Company) to engage in concerted refusals in the course of their employment to work and to perform services with the objects of: (1) forcing employers to cease doing business with the Company and (2) forcing suppliers and materialmen to cease doing business with employers who were engaged on projects on the Company's premises. All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record and to file briefs and proposed findings and conclusions. All parties filed briefs and the Company also filed proposed findings and conclusions. These documents have been carefully considered and the proposed findings and conclusions are rejected only to the extent that they are inconsistent with the detailed findings and conclusions set out below.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The Business of the Company

General Electric Company, a New York corporation, operates a plant near Louisville, Kentucky, where it manufactures washers, dryers and other household appliances. During 1957 the Company shipped finished products valued in excess of $10,000,000 from its plant directly to points out-

side Kentucky. There is no dispute, and I find, that the Company is engaged in commerce within the meaning of the Act.

II. The Respondent

The Respondent is a labor organization admitting to membership employees of the Company.

III. The Alleged Unfair Labor Practices

A. *"Appliance Park"; the Respondent's representative status; the issue*

"Appliance Park" is the name given by the Company to its plant near Louisville, Kentucky. Four public roads surround Appliance Park. The acreage is approximately 1,000, almost in the shape of a square. The property is not fenced, but around it is a drainage ditch of such width and depth that vehicles can enter and leave the premises only on 5 roadways across culverts. These 5 roadways for vehicular ingress and egress are inaccurately called "gates," as appears below, and are numbered 2, 3, 3A, 4 and 5.

At the time of the hearing there were 10,500 employees at Appliance Park, of whom substantially more than one-half were production and maintenance employees for whom the Respondent is the certified bargaining representative. As recited below, during July 1958 the Respondent called a lawful strike against the Company.[1] Picketing occurred at all gates, including Gate 3A which the General Counsel and the Company contend had been reserved by the Com-

[1] In its brief, the Company says that at the time of the strike the Respondent represented 7,600 employees.

pany for several years for the exclusive use of contractors and their employees who came to Appliance Park to perform work. The General Counsel does not contend that the picketing at gates other than 3A was invalid. Our question is whether, under the circumstances to be recited, the picketing at Gate 3A was prohibited by the secondary boycott provisions of the Act. Before we reach that question it is necessary to discuss further the operations of the Company, its use of local contractors, the strike, and the picketing.

B. *The Company's operations; its use of contractors*

Appliance Park contains 13 buildings, 6 of which house the departments of the plant in which manufacturing operations take place as follows: No. 1, washers and driers; No. 2, ranges; No. 3, dishwashers and disposalls; Nos. 4 and 5, household refrigerators and freezers; and No. 6, room air conditioners. Each of these departments is operated on an independent basis with its management being charged with the responsibility of making a profit. From time to time the management of one of the departments will contract with local concerns for needed services. A seventh department, called the Relations and Utilities Department, also sometimes contracts with local concerns for services to be performed in other buildings and upon the grounds. The following kinds of work illustrate the variety which is done under contract: (1) maintenance work; (2) the installation, repair or alteration of air conditioning, ventilating, heating and electrical equipment; and (3) work in converting to the manufacture of new models, such as, revamping manufacturing facilities, retooling, rearranging

conveyors, and installing new facilities, equipment and presses.

Work is awarded to contractors because (1) the Company's employees lack the manpower or skill to perform it, or (2) the work would be more costly if performed by the Company's employees. In the latter instances a unique competitive bidding system exists. Within the Relations and Utilities Department there is a department called "Central Maintenance" which sometimes is asked by the management of a department to bid in competition with contractors on work to be done in Appliance Park.[2] This is in line with the independent operation of each production department, mentioned above. Weber, identified in the last footnote, testified that the management of the production departments use the service of Central Maintenance in preference to contractors "whenever they possibly can" and that "all efforts are made to funnel work down through Central Maintenance consistent with the labor force and so forth they have and with the type of job itself." In instances where Central Maintenance's bid is low, the job is awarded to it. If, however, a delay intervenes and Central Maintenance's employees of the needed qualifications have become occupied on jobs elsewhere in Appliance Park, Central Maintenance may decline to accept the award.

[2] Lester H. Means, the manager of the Relations and Utilities Department, testified that the Company has "a large maintenance group of our own that does the routine day-in-and-day-out type of maintenance." Robert H. Weber, a buyer in that department, testified that he was unsure but thought that there were about 100 employees in Central Maintenance. The record does not disclose, however, the proportion of the total maintenance group that Central Maintenance constitutes. The Respondent asserts that the Central Maintenance employees are in the production and maintenance unit which it represents.

It thus appears that the employees of contractors work in buildings and elsewhere in Appliance Park in proximity to employees of the Company and that the work of the former employees is of a class and sometimes even of an exact kind as that which is performed by the Company's employees; that is, the contractors' employees, like the Company's employees, are engaged in work related to the production of finished products or to the maintenance of the plant.[3]

C. *Restrictions upon the use of the 5 gates; the strike; the valid picketing at 4 gates; the allegedly invalid picketing at Gate 3A*

We have seen that Appliance Park has an acreage of about 1,000 in almost a square shape. Therefore, each side is about 6,600 feet in length. We have seen too that there are five entrances to Appliance Park which are called "gates." Numbers 4 and 5 are on the west and south sides, respectively. Numbers 2, 3 and 3A intersect Buechel Bank Road, a public road, on the north side. Although picketing occurred at all 5 gates, it is alleged to have been invalid only at Gate 3A. The diagram attached as Appendix, not to scale, shows the area of Gates 3 and 3A which are about 550 feet apart, measured along Buechel Bank Road from points midway between the gates. Appliance Park is to the left of that road as one looks at the diagram.

The reader's attention is directed to the numerals 3 and 3A near points on the diagram where 2 roadways into Ap-

[3] The General Counsel, in his brief, acknowledges that "some of" the types of work done by the contractors "had on occasion, in times past, been performed by employees of Charging Party's General Maintenance Force known as Central Maintenance."

pliance Park intersect Buechel Bank Road. In a literal sense it is inaccurate to say that there is a gate at either point. On the east and west sides of the two roadways there is a metal stanchion. An aluminum chain across each roadway, attached to stanchions, serves to block ingress and egress of vehicles on nonworking days and during the night hours of 6 p. m. to 6 a. m. As illustrated on the diagram, at Gate 3 there is a gatehouse. Guards in the plant protection force are stationed there during hours when the roadways are open to traffic. At Gate 3A, however, there is neither a gatehouse nor a guard and, when the chain is not across the roadway vehicles entering Appliance Park at that point may be driven without challenge in a southerly, then easterly, direction to a point near the gatehouse where the occupants must establish to a guard's satisfaction their right to enter Appliance Park.[4] Identification stickers for motor vehicles, differing in sizes, shapes and colors, enable a guard to tell upon sight the gate through which a vehicle is anthorized to enter Appliance Park and whether the vehicle is owned by an employee of the Company or by a contractor or his employee. In addition, there are identification cards for employees of the Company and contractors. Employees of the Company use Gates 2, 3, 4 and 5, but not 3A.[5] Trucks bearing raw materials for the plant, or finished products from it, use Gates 3 and 4. Gate 3A is used by contractors and their employees, and at all times material a sign there has directed the Company's employees to use other gates.

[4] During the strike a guard was stationed at Gate 3A but ordinarily no one is stationed there.

[5] See footnote 8.

With the above recitation of the Company's business and its use of contractors, we come to the strike against the Company and to the validity of the picketing. On July 27, 1958, the Respondent called a strike against the Company because of 24 unsettled grievances. Each of the five entrances was picketed peacefully. The signs recited clearly that the Respondent's dispute was with the Company only:

Local 761
ON STRIKE
G. E. UNFAIR

Picketing at Gate 3A was highly successful. By oral appeals and the display of picket signs, the Respondent induced employees of contractors not to enter Appliance Park for the purpose of working there. Few, if any, employees of contractors passed the pickets for that purpose although some entered to obtain their tools. The picketing was less successful at other gates, however, and the Company continued its operations. More than 2,000 production and maintenance employees, represented by the Respondent, worked during the strike, as did many others who are outside the bargaining unit. On August 9, picketing at Gate 3A was enjoined in a proceeding under Section 10 (1) of the Act. On August 10 the strike ended and all picketing ceased. The question for decision is whether the picketing and oral appeals at Gate 3A violated Section 8 (b) (4) (A), which reads:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) * * * to induce or encourage the employees of any employer to engage in * * * a concerted refusal in the

course of their employment to * * * handle or work on any goods * * * or to perform any services where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person; * * *. *Provided*, that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

D. *Factual summary*

Before discussing the issues, certain points should be made clear. *First*, the Respondent is the exclusive representative of the Company's production and maintenance employees. *Second*, the strike was a lawful one. *Third*, the picketing was peaceful.[8] *Fourth*, the General Counsel does not contend that the picketing at Gates 2, 3, 4 and 5 was invalid. *Fifth*, the picket signs made it clear that the Respondent's dispute was with the Company only. There was no effort by the Respondent to halt the operations of any contractor at any place other than Appliance Park. *Sixth*, there is no occasion here to apply the ally doctrine of *International Union of United Brewery etc. (Adolph Coors Co.)*, 121 NLRB No. 35, and cases cited therein. This is so because all awards to the contractors were made

[8] The Company asserted, and offered to prove, that on the first day of the strike the Respondent engaged in mass picketing and violence. The evidence was rejected because the subject is not in issue under the pleadings. There is no allegation that Section 8 (b) (1) (A) was violated.

before the strike and, therefore, did not cover jobs which would have been performed by the Company's employees if the strike had not occurred. *Seventh*, one defense contention need not be definitely decided. The Respondent contends, and the General Counsel and the Company deny, (1) that Gate 3A was not reserved exclusively for contractors and their employees, (2) that some of the Company's employees also used that gate, (3) that the Company did not inform its employees at any time that the gate was not available to them, and (4) that the Company did not give assurances to the Respondent that the Company's employees would not be permitted to use the gate during the strike. It is unnecessary to detail the evidence and to resolve all the conflicts. This is so because the Respondent will prevail here even if its contentions concerning the use of the gate are unfounded. Therefore, the discussion below is based upon the premise that Gate 3A was reserved exclusively for contractors, their employees and suppliers,[7] and that the Respondent, in picketing at that gate, did not seek to solicit any of the Company's employees to cease work. Certain observations about the Respondent's contentions are made in the footnote, however.[8]

---

[7] The evidence establishes that employees of contractors were stopped by pickets at Gate 3A. It is alleged, but not proved, that employees of contractors' suppliers also went to Gate 3A during the strike. If no employee of any contractor worked during the strike, as the General Counsel and the Company contend, it may be that the contractors had no need for materials during the strike.

[8] As noted in the factual recital, during working hours anyone may enter upon the roadway at Gate 3A and proceed as far as the gatehouse because there is no guard or obstruction at that gate during those hours. The question is whether an employee of the Company who uses that roadway is likely to be unobserved by a guard at the gatehouse or, if observed, to pass without challenge. There is testimony by the Respondent, which the General Counsel and the Company dispute, that upon rare occasions several employees among

(Footnote continued on following page)

E. *The first issue: Is this a "common situs" case?*

The Company asserts that this is a common situs case. The Respondent asserts the contrary. The General Counsel did not state his position in precise words. Although he cites certain common situs cases, he speaks of the premisos of a primary employer, and I think that he agrees with the Respondent.

Few definitions of the term "common situs" have come to my attention. One appears in *Retail Fruit & Vegetable Clerks' Union et al. (Crystal Palace Market)*, 116 NLRB 856, as follows:

> • • • a "common situs"—*i.e.*, premises jointly occupied by primary and secondary employers.

Another definition appears in the Board's brief to the Court in a pending case, *Office Employees International Union, et al. v. N. L. R. B.*, No. 14479 (C. A. D. C.), for review of 120 NLRB No. 58. There it is said:

> Here we have a "common situs" situation, *i.e.*, a situation where the employer involved in the dispute [with a labor organization] shares the premises with other employers who are not involved in the dispute.

(Footnote continued from preceding page)
the 10,000 were permitted to go on after reaching the gatehouse. It may be that once in a while an employee of the Company, coming from Gate 3A, has passed the gatehouse without being noticed or challenged by a guard. But if a guard noticed but did not challenge the employee, the guard violated his instructions. The Company has sought to require its employees to use the other gates. The guards have received appropriate instructions. Automobiles belonging to employees have stickers which permit entrance only at other gates. A sign at Gate 3A says that employees must enter elsewhere. Turning from this subject to the Respondent's assertion that the Company gave no assurance that during the strike it would not permit its employees to use that gate, and that the Respondent anticipated that such employees would be permitted to use the gate because the Company was doing everything within its power to persuade employees to return to work, the short answer is that, insofar as appears, (1) the Respondent did not ask for such assurance, (2) no nonstriking employee sought to use Gate 3A, and (3) the Respondent did not postpone picketing at that gate until nonstrikers might seek to us it but began to picket all gates simultaneously.

It is apparent that Appliance Park is not "jointly occupied" by the Company and the contractors and that the Company does not "share its premises" with the contractors. Nor is Applicance Park a place "where" the primary and secondary employers' businesses were both located on the same premises.'"[9] On the contrary, Appliance Park is a hugh manufacturing establishment of more than 1½ square miles which is owned and operated by the Company and at which over 10,000 of its employees plus an undisclosed number, but relatively few, employees of contractors are engaged in work toward the same ends, namely, the manufacture and sale of the Company's household electrical appliances and the maintenance of the manufacturing establishment. If we have a common situs case here, as distinguished from a single situs or separate premises case, I find it difficult to imagine a situation where any manufacturing plant would not be a common situs at one time or another. Rarely can a manufacturer do business in our commercial society unless employees of other employers come to his plant and work in performing the business of their respective employers, whether it be to install fixtures or equipment, to do repair or service work, to deliver or to receive a truckload or a carload of materials, or for other purposes. Moreover, if we have a common situs case here, the proviso to Section 8 (b) (4), which is discussed near the end of this Intermediate Report, may apply to relatively few, if any, of the Nation's vast number of manufacturing plants.

---

[9] A quote from a quote in footnote 11 of the opinion in *Retail Fruit & Vegetable Clerks' Union, et al. v. N. L. R. B.*, 249 F. 2d 591, 41 LRRM 2131, 2138 (C. A. 9), enf'g *Crystal Palace Market, supra.*

F. *Are the Act's secondary boycott provisions applicable to the picketing at Gate 3A?*

There are no recent precedents which are in point here. The cases which were litigated in the early days of the Taft-Hartley Law are uniformly against the General Counsel's position. If his position is sound, substantial revisions in decisional law must be made by the Board and the Courts with a sharp curtailment of the right to strike and to engage in traditional primary strike activity as provided in Sections 7 and 13 of the Act.[10]

1. The Board cases

The Board has consistently said that the secondary boycott provisions of the Act were not aimed at traditional primary strike activity although one object and result of such activity is to terminate the business which secondary employers do with the struck primary employer at the premises occupied solely by the latter. An early case is *Pure Oil Company*, 84 NLRB 315, which did not receive judicial review. Its doctrine is applicable today since the Board cited it with approval as recently as *Polar Water Co.*, 120 NLRB No. 25. The factual situation in *Pure Oil* is recited from the Board's 14th Annual Report, page 96:

[10] Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 13 provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right."

> • • • an oil workers' union, in support of its strike against the Standard Oil Company over the terms of a new agreement, picketed Standard Oil's own refinery and dock. As a consequence, employees of Pure Oil refused to cross the picket line to enter upon the dock in order to load Pure Oil's products on a tanker for shipment elsewhere. Before the strike, this work had been performed regularly by Standard Oil's employees under an arrangement between Standard Oil and Pure Oil. In addition, the crew of a tanker (members of the National Maritime Union) refused to receive Pure Oil cargo unless loaded by Standard Oil foreman, who were not involved in the dispute.

In *Pure Oil* the Board dismissed allegations of secondary boycott activity and quoted the late Senator Taft's assurances that primary strikes over terms and conditions of employment were recognized *throughout the Act* as "entirely proper" and that Section 8 (b) (4) (A) did no more than "reverse the effect of the law as to secondary boycotts." The Board held in *Pure Oil* that Section 8 (b) (4) (A) was not "intended to curb traditional *primary* action" and "does not outlaw any of the primary means which unions traditionally use to press their demands on employer." This is so, said the Board, although

> A strike, by its very nature, inconveniences those who customarily do business with the struck employer • • • [and] any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer.

Our Respondent's case is stronger than was the case of the respondent in *Pure Oil*. This is so because the employees of *Pure Oil*, the secondary employer, were induced not to enter upon the premises of Standard Oil, the primary employer, to do work which had no relation to Standard Oil's production, whereas here the contractors' employees were at work in the production and maintenance aspects of the primary employer's business at Appliance Park. It follows that if the General Counsel is to prevail here, *Pure Oil* must be overturned. But *Polar Water, supra*, says it is still law.

Another early case is the 1949 decision in *Ryan Construction Co.*, 85 NLRB 417. That case also was not reviewed by a court and some authorities disagree whether its doctrine was approved by the Supreme Court of the United States, as set out in the footnote.[11] In *Ryan*, the respondent union picketed the entire premises of the primary employer, Bucyrus, including a gate which served employees of Ryan, a construction company that was engaged in erecting *an addition to the plant*. The Board, holding that picketing of that gate was not a violation of Section 8 (b) (4) (A), said:

> • • • Concededly, an object of the picketing [at all gates] was to enlist the aid of Ryan employees, as well as that of employees of all other Bucyrus customers and suppliers. However, Section 8 (b) (4) (A) • • • was intended only to outlaw certain *secondary*

[11] Board Members Leedom and Rodgers expressed their opinion in *Crystal Palace Market, supra*, at 116 NLRB 859-60. Member Bean expressed his opinion in footnote 20 of the same case at page 866. The two other then members expressed their opinion at pages 868-70. The Court of Appeals for the Ninth Circuit expressed its opinion upon review of the same case, *sub nom. Retail Fruit & Vegetable Clerks' Union, et al. v. N. L. R. B., supra.*

boycotts, whereby unions sought to enlarge the economic battleground *beyond the premises of the primary Employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute,* it cannot be called "secondary" even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 other employees wish to enter the premises. [Latter emphasis supplied.]

The *Ryan* decision, it should be noted, was not without dissent, and today there are two members of the Board who have expressed their disagreement with it. *Crystal Palace Market, supra.* But *Ryan* has not been overruled. *Roanoke Bldg. & Const. Trades Council (The Kroger Co.),* 117 NLRB 977, 978. Moreover, even if *Ryan* had been overruled, that circumstance would not be authority necessarily to hold here in favor of the General Counsel. This is so because we have here a case which is stronger from the standpoint of our Respondent. In *Ryan* the dissent points out that "Ryan's building operations [were] manifestly unrelated to the [production] operations of Bucyrus' struck plant * * * [and] the construction site was located on a portion of Bucyrus' premises specifically set aside for such purposes, with its own, exclusive means of access." Here, on the other hand, employees of the contractors worked in the same buildings and work areas as did employees of the Company, and the work of the contractors' employees was related to the operations of the struck plant,

being of the class, and in part the same kind, of work as was performed by the Company's employees.[12]

In *Santa Ana Lumber Co.*, 87 NLRB 937, the Board held that the solicitation of secondary employees not to enter a struck plant to load or unload goods is "traditional *primary* action." *Santa Ana*, an old case, was approved recently by two Board members, as noted immediately below.

2. The Court cases

Two of the cases to be discussed here are *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665, 71 S. Ct. 961, and *Di Giorgio Fruit Corporation v. N. L. R. B.*, 191 F. 2d 642 (C. A. D. C.), cert. den. 342 U. S. 869. These cases, along with *Santa Ana*, were cited approvingly in the main opinion in *Crystal Palace Market, supra*, when the validity of picketing at premises occupied solely by a primary employer was being discussed:

> * * * we adhere to the rule established by the Board, with judicial approval, that accommodation of the policy of Section 13 (preserving the right to engage in a primary strike) requires that more latitude be given to picketing at such separate primary premises than at premises occupied in part (or entirely) by secondary employers. See *International Rice Milling* * * * *Di Giorgio* * * * *Santa Ana* * * *

In *Rice Milling*, the primary employer, Kaplan, operated a mill at which his employees went on strike. The pickets

[12] The Company seeks to distinguish *Ryan* upon the ground that here Gate 3A was used exclusively by contractors and their employees and suppliers while in *Ryan* the nonstriking employees could have used the "Ryan gate" although they had not used it before picketing began. If I correctly understand the principle for which *Ryan* stands, the possible use of the gate by nonstrikers was a minor factor in the decision.

induced employees of neutral employers not to enter the mill to obtain grain. The Board held, and the Court agreed, that the Act does not prohibit such inducement. According to the Supreme Court,

> * * * The picketing was directed at the Kaplan employees and at their employer in a manner traditional in labor disputes. * * * A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8(b) (4), and they do not here.

In *N. L. R. B. v. Denver Bldg. & Const. Trades Council*, 341 U. S. 675, 687, 71 S. Ct. 943, 951, the Court said that the union activity in *Rice Milling* is "traditional and permissible in a primary strike."[13]

In *N. L. R. B. v. Service Trade Chauffeurs*, 191 F. 2d 65, 28 LRRM 2450 (C. A. 2), the Court commented upon *Rice Milling* as follows:

> We take this to mean that a union may lawfully inflict harm on a neutral employer, without violating §8 (b) (4), so long as the harm is merely incidental to a traditionally lawful primary strike, conducted at the place where the primary employer does business.

[13] The Company attempts to distinguish *Rice Milling* on the ground that it involved only a single incident when two neutral employees came to the struck mill, whereas in the instant case various employees of contractors came to Gate 3A at different times. This contention is without merit, as is shown by *Di Giorgio*, discussed below, and by the above quotation from *Ryan* that "It makes no difference whether 1 or 100 other employees wish to enter the premises."

In *Di Giorgio*, the Board urged to the Court, and the Court agreed, (1) that the secondary boycott provisions of the Act "do not apply to activities of pickets at the place of their employment where they are using the picket line to enforce their right to strike against their own employer" and (2) that the pickets' inducements of neutral employees not to deliver goods or produce to the struck employer were valid. The concurring opinion in *Di Giorgio* relies upon *Rice Milling* and says that there was no inducement to *concerted* activity. The main opinion relies instead upon the Court's earlier determinations in *Denver Bldg. & Const. Trades Council v. N. L. R. B.*, 186 F. 2d 326, 26 LRRM 2515, which, said the Court, had not been reversed in pertinent part in *N. L. R. B. v. Denver Bldg. & Const. Trades Council, supra*. A pertinent part is that

> The context of the words "cease doing business" [appearing in Section 8 (b) (4) (A)] and the meaning attributed to them by the legislative history of the Act, by the Board and by the courts, require that they be construed as condemning as an unfair labor practice a secondary boycott or strike but not primary action even when an object in a limited sense may be construed to be to force or require an employer to cease doing business with another. * * *

3. The General Counsel's contentions

We come to the General Counsel's contentions, keeping in mind the principles of the above cases plus the facts that (1) the Company's employees use Gates 2, 3, 4 and 5; (2) the secondary employees of carriers for the Company and its customers and suppliers also use Gates 3 and 4; and

(3) the employees of contractors and their suppliers are the *only* employees who use Gate 3A. The General Counsel asserts in substance that

> The picketing at Gate 3A was not primary picketing but was an invalid extension of the primary dispute because the Company's employees (the primary employees) use other gates;
>
> The picketing at Gate 3A was of deliberate design with the sole object of reaching employees of secondary employers and was not merely an "unavoidable incident" of primary strike activity;[14]
>
> It was incumbent upon the Respondent to conduct its picketing so as to reach employees of the Company without reaching other employees *except incidentally*;[15]

[14] The term "unavoidable incident" appears in *Columbia-Southern Chemical Corp.*, 110 NLRB 206, which involved both a common situs construction project plus picketing some distance away from the situs of the primary dispute thereon, and which, therefore, is inapposite. The term appears also in the main opinion of two Board members in *Crump, Inc.*, 112 NLRB 311, which also is inapposite. *Crump* involved a factual situation somewhat like that in *Ryan*. Crump was engaged in constructing an addition to Kaufmann's department store. Unions representing Kaufmann's employees went on strike. Crump's construction work was affected by the activities of pickets. Four members of the Board issued three opinions. A majority condemned certain conduct of the pickets *but not the picketing itself*. The main opinion holds that the respondent "engaged in the type of conduct which has been proscribed as unlawful by the Board in common situs cases." Another member held that the entire premises constituted the single situs of Kaufmann, the primary employer. Still another member held that the construction site constituted the separate situs of Crump, the secondary employer.

[15] In *Crystal Palace Market, supra*, two members of the Board wrote of a requirement "that the picketing be so conducted as *to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching primary employees.*" But this quotation, if applied here, would be sharply at odds with the quotation set out on page 9 above in which *Rice Milling*, *Di Giorgio* and *Santa Ana* are cited. Both quotations are found in the same opinion. Since the signers of the opinion were not advancing inconsistent doctrines, it follows that in *Crystal Palace Market* they were speaking of a common situs situation when they wrote as quoted in this footnote. Their opinion makes that point clear. Moreover, over 40 employers occupied the premises in that case, as the Court's opinion recites, footnote 16, *post*.

and, now quoting the General Counsel—in decisional law there is

> one clear point, *i.e.* that a determination of legality or illegality of picketing activities turns not upon whether the picketing occurred at the premises of the primary employer [occupied solely by him], but upon whether a definite purpose of the picketing is to disrupt operations of the secondary employer [even at premises occupied solely by the primary employer], and whether the picketing of the primary employer could have been carried on effectively without embroiling secondary employers.

The words in brackets within the quotation clarify the position of the General Counsel. The distinction which he draws between the picketing at Gate 3A, on the one hand, and at Gates 3 and 4, on the other, is that while there were appeals to secondary employees at all three gates, such appeals at Gates 3 and 4 were incidental to the appeals to primary employees who also used those gates, whereas at Gate 3A the appeals were exclusively to secondary employees. Two basic fallacies are apparent in the General Counsel's position. First, he would apply here certain principles which were established in cases that involved picketing at a *secondary* employer's separate premises or at a common situs. Second, he asserts in substance that a union which is the statutory representative of employees and which, in the course of a lawful strike, pickets the premises occupied solely by the primary employer, may not appeal *deliberately and directly* to employees of secondary employers to stay out of the struck plant. In these situations, the General Counsel says in effect, such unions, in

appealing to employees (as distinguished from appealing to the consuming public), must direct their appeals only to the primary employer's nonstrikers.

If the General Counsel's position is sound, then Senator Taft was much in error when he said, in speaking of Section 8 (b) (4) (A), that "All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." Instead of such a limited reversal, the result would be a drastic limitation upon (1) the right to strike for a lawful object and (2) traditional primary strike action. This result follows logically from the General Counsel's position. Thus, if a primary employer, involved in a lawful strike by his employees at premises occupied solely by him, can use a separate entrance to isolate contractors' employees from peaceful primary picketing, he also can use a separate entrance to isolate employees of his suppliers and customers, as well as employees of carriers for himself and his suppliers and customers. The Company is frank to say in its brief that this is so. The General Counsel declines to take a position in his brief, but compare his position in *Lumber and Sawmill Workers Local Union 2409, et al. (Great Northern Railway Company)*, Case No. 19-CC-109, Intermediate Report (SF)-567, now pending before the Board. It follows logically too, I believe, in a situation where the primary employees use the *same* entrance as employees of suppliers and customers (or employees of carriers for either), that *oral* appeals by the primary striking employees to the secondary employees not to cross their picket line would be invalid. This is so because there is no real difference in the *object* of the striking employees when they make the oral appeal at a

joint entrance and when they use a picket sign at a segregated entrance. I cannot reconcile these propositions with the legislative history of the Act or with the decisional law.

4. The General Counsel's authorities

We consider now the principal authorities cited by the General Counsel and the Company. Two of the cases are distinguished in footnote 14. Another, *N. L. R. B. v. Denver Bldg. & Const. Trades Council, supra*, is inapposite because it involved a common situs situation.

Moore Drydock Co., 93 NLRB 547, involved a roving situs which came to rest at the premises of the *secondary* employer where the picketing occurred.

Incorporated Oil Co., 116 NLRB 1844, is a case in which the Board's Order was set aside by the Court in *Local 618, Automotive Employees v. N. L. R. B.*, 249 F. 2d 332, 41 LRRM 2106 (C. A. 8), and I do not know whether the majority opinion of the Board still represents a majority's views. Assuming that the opinion does, the fact remains that the opinion is based expressly upon an unusual situation and that the primary employer who owned the picketed premises was not engaged in business operations there, whereas here thousands of the Company's employees were at work during the strike.

Crystal Palace Market, supra, which received judicial approval, is distinguished by an excerpt from the Court's opinion as set out in the footnote.[16]

[16] The Court's opinion is cited in footnote 9 above. The opinion emphasizes that many employers (merchants) conducted their *entire* business operations as *lessees* in the building owned by the primary employer. Thus, "* * * Long, the primary employer against whom Local 648 was picketing, owned the

(Footnote continued on following page)

Atomic Projects & Production Workers, et al (New Mexico Bldg. Branch, etc.), 120 NLRB No. 58, is now before the Court of Appeals for the District of Columbia Circuit, sub nom. *Office Employees International Union, et al. v. N. L. R. B.*, No. 14479. It is distinguished for reasons set out in the Board's brief to the Court, as recited in the footnote.[17]

5. Conclusions

My conclusions embody nothing new. They reflect only established law. I hold that Section 8 (b) (4) (A), which was aimed at secondary boycotts, does not contemplate such drastic inroads on traditional primary strike activity as inheres in limiting union pressures solely to an appeal to workers who are employed directly by the struck employer. I hold also that traditional primary strike activity lawfully includes, but is not limited to, deliberate attempts to halt the operations of the struck plant by peacefully soliciting secondary employees, orally or by picketing:

(Footnote continued from preceding page)
entire market building. * * * Here, in addition to the primary employer owning the premises where it does business, there are neutral employers leasing space from the primary employer; there are not one, two or three neutral employers involved here, but between two and three score, and their businesses would have been materially affected by the pickets at the entrance to the market. * * * Here the entire business operations of the many neutral employers were being conducted on premises owned by Long, the primary employer, and will probably continue to operate thereon so long as business conditions justify. This unique situation (not duplicated in any case called to our attention) may well account for the differences of opinion among Board members as to principles properly applicable to the facts of this case. * * *".

[17] In that case the primary employer, Sandia Corporation, was engaged in work for the Atomic Energy Commission within the confines of a military installation. As the brief recites, the case differs "from the normal primary picketing situation where a union pickets the separate premises of an employer with whom it has a dispute. * * * This is wholly different from the instant case where, as shown in the text, we have a 'common situs' situation in which Sandia Corporation was only one of many employers operating on premises under the direct control of *a third party*, the military authorities." [Emphasis added.]

(1) not to bring materials or goods into, or to take them from, the struck plant; and

(2) (a) not to contribute to production or maintenance by working in the struck plant, and (b) not to supply materials for use by the secondary employees mentioned in (a).

I agree with the General Counsel and the Company that at Gate 3A the Respondent's appeal was to secondary employees only, but I say that that was merely a part of traditional primary strike action. The picketing at Gate 3A was for the same lawful object as was the picketing at the other four gates, namely, to halt the operations of Appliance Park by appeals which were directed collectively to (1) the Company's employees at Gates 2, 3, 4 and 5; (2) the consuming public at any gates which it used; (3) the secondary employees who were engaged in transporting raw materials and finished products, and who used Gates 3 and 4 along with the Company's employees—and it may be reiterated now that the picketing at Gates 3 and 4 is not alleged to have been invalid—and (4) the contractors' employees at Gate 3A. In none of these instances was a neutral employer brought into the controversy except as a consequence of permitted traditional primary strike action—and Section 8 (b) (4) (A) does not protect the business of a neutral employer within the situs of a primary dispute. In this case we have *valid primary activity with secondary effects.* We do not have *invalid secondary activity* because the Respondent did not induce or encourage employees of the contractors to cease work at any place other than Appliance Park, the premises of the primary employer.

The reasoning above makes it unnecessary to determine whether the General Counsel's position conflicts with the proviso to Section 8 (b) (4) which is set out above on page 5. If, as I believe to be a fact, the unions which represent the employees of the contractors could have induced or encouraged those employees not to enter Appliance Park during the Respondent's strike, and such inducement or encouragement would have been protected by the proviso (cf. *Interborough News Co.*, 90 NLRB 2135, 2146-9; *Di Giorgio*, 87 NLRB 720, 746), it perhaps would be incongruous to hold that the Respondent could not have induced or encouraged such valid action by the other unions.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The operations of the Company constitute trade, traffic and commerce among the several States within the meaning of Section 2 (6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2 (5) of the Act.

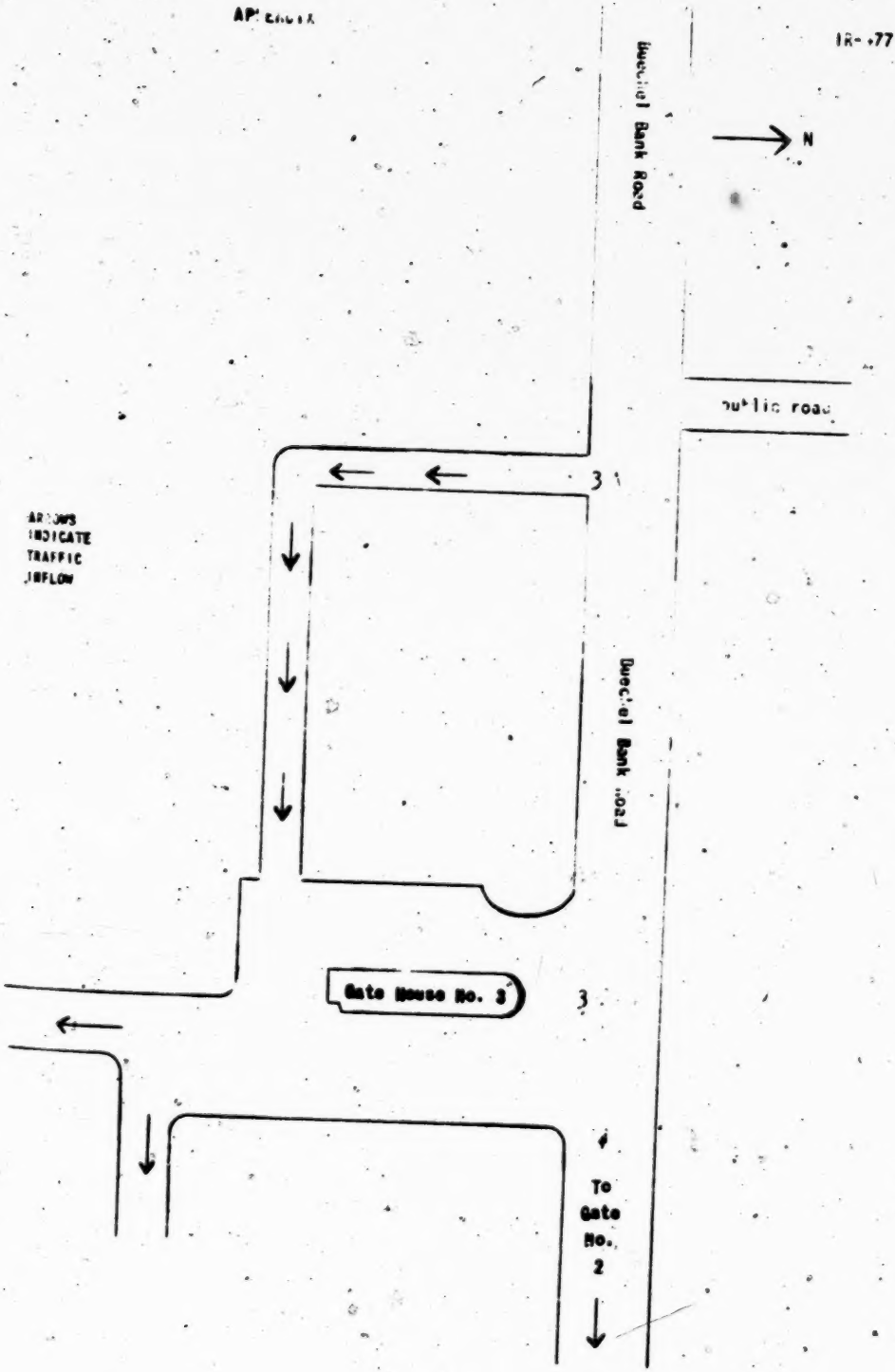
3. The allegations of the complaint that the Respondent engaged in unfair labor practices have not been sustained.

RECOMMENDATIONS

It is hereby recommended that the complaint be dismissed in its entirety.

Dated at Washington, D. C., this 30 day of December 1958.

A. BRUCE HUNT,
Trial Examiner.


Bucclel Bank Road
N
public road
ARROWS INDICATE TRAFFIC INFLOW
Bucclel Bank Road
Gate House No. 3
To Gate No. 2

Decision and Order.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

—o—

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

and

GENERAL ELECTRIC COMPANY, APPLIANCE AND TELEVISION RECEIVER DIVISION.

Case No. 9-CC-158

—o—

On December 30, 1958, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, copy of which is attached hereto, finding that the Respondent had not engaged in and was not engaging in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter the General Counsel and General Electric Company, the Charging Party herein, filed exceptions to the Intermediate Report and supporting briefs.[1]

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings of the Trial Examiner only to the extent consistent herewith.

[1] The motion of the Charging Party that the Board grant oral argument is hereby denied, as the record, exceptions, and briefs, adequately reflect, in our opinion, the issues and positions of the parties.

The labor dispute herein occurred at the Company's "Appliance Park" plant, about "10 miles from downtown" Louisville, Kentucky, which contains 13 buildings where the Company manufactures 6 basic lines of products. Ingress and egress from the plant is limited to 5 locations, which may be termed "gates." Of the 5, only 3-A is the gate where it is contended that picketing in violation of Section 8 (b) (4) (A) of the Act occurred.[2]

At the time of the hearing on September 22, 1958, the Company employed about 10,500 employees at Appliance Park, including about 7,600 production and maintenance employees represented by the Respondent. Because of the inability of its own employees to perform all the renovating and maintenance work at Appliance Park—because its own maintenance employees lack the necessary skills and/or because there is not enough manpower available—the Company regularly contracts with various independent contractors to perform certain work at the plant, some of long-term duration. Such jobs include (1) general maintenance work, (2) installation, repair or alteration of air conditioning, ventilating, heating and electrical equipment, and (3) converting to the manufacture of new models, such as revamping manufacturing facilities, retooling, rearranging conveyors, and the installing of new facilities, equipment and presses.[3] At the time the strike was called

[2] See diagram attached as an appendix to the Intermediate Report, showing the location of gates 3 and 3-A, which are about 550 feet apart. Gate 3-A was especially established in 1953 for the exclusive use of independent contractors and their employees. The other gates are numbered 2, 3, 4.

[3] We find, in agreement with the Trial Examiner, no "ally" relationship here since the independent contractors either perform work entirely different from that of the Company's employees or such work was contracted for *prior* to the labor dispute herein. The Respondent does not contend that there is an "ally" relationship.

on July 27, 1958, the Company had contracts with 12 employers and work had actually been started by 6 employers, involving, *inter alia*, such major alterations as (a) construction of a mezzanine floor on a building, (b) building a truck dock, (c) erection of an air shelter, and (d) rearranging a conveyor line. Moreover, the Company maintained more or less permanent business relations with various of its independent contractors. One contractor, R. J. Heffernan Company, had been at Appliance Park "approximately 5 to 6 years, practically regular", employing a work force that varied from 1 to 50 men. In addition, its employees, at the time of the strike, had been working continuously at the plant for "maybe a year or two." Another independent contractor, Service Erection and Machine Company, had been "doing work from time to time" for a period of 2½ years. An employee of a third contractor, Wehr Constructors Company, had worked at the plant for "2½ years, off and on." A fourth company, Garst-Receveur, had been at Appliance Park almost continuously for over 2 years. Further, Appliance Park manufactures various products requiring model changeovers at regular periods. The record shows that the Company regularly contracts with other employers for aid in converting to new models.

On January 20, 1954, the Company issued written instructions to its guards limiting gate 3-A to independent contractors and their employees. The reason, as stated in the instructions, is that "In the event of labor difficulties with the various AF of L Craft locals this separate entrance gate for Direct Contractors' employees should also minimize the possibility of picketing our regular entrances." A company witness testified that 22 jurisdictional strikes among the craft union employees employed

by the contractors had occurred at the plant over a period of a few years. Since January 1958, a large sign has been posted at gate 3-A which reads:

GATE 3-A
FOR EMPLOYEES
OF CONTRACTORS
-ONLY-
G. E. EMPLOYEES
USE OTHER GATES

A witness testified without contradiction, and we find, that similar signs have been posted continuously at gate 3-A since 1953. In order to effectuate this rule of requiring contractors' employees to use only 3-A and its own employees to use the other gates, the Company has established a fairly elaborate identification system consisting of distinctive stickers to be attached to vehicles, which practically all employees used in coming to and going from work[4]. By these stickers, the guards are able to tell at a glance whether the correct entrance is being used. There was testimony that the guards strictly enforced this rule, requiring persons using the wrong gate to turn back and use the correct gate.[5]

[4] Also, the contractors' employees and the Company's employees were formerly required to wear identification badges, but this proved unfeasible. Company employees still carry identification cards, however. Contractors' employees who are not recognized by guards at gate 3-A are required to be checked against registration cards kept at the guardhouse for all contractors' employees.

[5] Although gate 3-A did not have a guard stationed there prior to the strike, vehicles entering there passed by gate 3, where the 2 guards at that location enforced the rule for both gates. (See diagram in Appendix of Intermediate Report.)

Contrary to the Respondent's contention, we find that the Company's employees were not permitted to, and did not, use gate 3-A during all periods material herein. In an attempt to establish such use, the Respondent called 3 Company employees as witnesses. However, 2 of the employees admittedly have not used gate 3-A since the present sign was placed there in January,

(Footnote continued on following page)

On July 27, 1958, the Respondent called a strike because of 24 unsettled grievances with the Company. Picketing occurred at all 5 gates, including gate 3-A, until August 9, when an injunction was issued by a federal district court. The strike was called off the next day. The picket signs at all gates read:

LOCAL 761
ON STRIKE
G. E. UNFAIR

The picketing was effective. Most, if not all, of the independent contractors' employees refused to cross the picket line, and did not work during the strike.[6] When some employees of independent contractors came up to the picket line, the pickets told them to "go home." When three employees of an independent contractor drove up in a car, and the driver asked the pickets if they could enter the premises, the pickets said, "no." So I asked them if I could go in and get my own personal tools and they said, "no." The driver of another car pointed to his contractors' identification sticker, but the pickets "didn't ask me anything, shook their heads, and that was all." Another employee was told by the pickets that he would have to get a pass permitting him to enter from the Respondent's office. Pickets were given written orders to take the license number of any trucks passing the picket lines. The reason therefor "was because we wanted to talk to these people and explain our side of the story."

(Footnote continued from preceding page)
1958. The third employee testified that on one occasion, July 15, 1958, he was permitted to depart by way of gate 3-A by a guard named "Happy." A lieutenant of the plant guards testified that there was no guard who was called "Happy." At best, the Respondent has shown that only 3 out of over 10,000 Company employees have ever used gate 3-A since it was established for the exclusive use of contractors' employees in 1953.

[6] About 2,000 of the Company's production and maintenance employees continued to work during the strike.

The Trial Examiner found no violation because he was of the opinion that the picketing at gate 3-A was "traditional" picketing protected by the Act. We disagree.

We find from the foregoing that only the independent contractors' employees were permitted to use gate 3-A, and that the Respondent was aware of this fact. We find also that the Respondent's object in picketing at gate 3-A was to enmesh thesa employees of the neutral employers in its dispute with the Company. Such purpose is shown not only by the picketing at gate 3-A but also by the oral appeals to the employees of neutrals not to cross the picket line.

Accordingly, in view of the foregoing, and upon the record as a whole, we find that the Respondent violated Section 8 (b) (4) (A) of the Act by inducing and encouraging the employees of independent contractors to engage in a concerted refusal to work with an object of forcing the independent contractors to cease doing business with the Company.[7]

The Effect of the Unfair Labor Practices upon Commerce

The activities of the Respondent, as set forth above, which have been found to constitute unfair labor practices, occurring in connection with the operations of the companies involved herein, have a close, intimate, and substantial relation to trade; traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[7] See *Associated General Contractors of America*, 120 NLRB No. 58, enf'd 43 LRRM 2461 (C. A. D. C.)

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from engaging in, or inducing or encouraging the employees of R. J. Heffernan Company, Service Erection and Machine Company, Wehr Constructors Company, Garst-Receveur Company, Liberty Engineering and Manufacturing Company, or Hatfield Electric Company, or any other employer, except General Electric Company, to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require R. J. Heffernan Company, Service Erection and Machine Company, Wehr Constructors Company, Garst-Receveur Company, Liberty Engineering and Manufacturing Company, or Hatfield Electric Company, or any other employer or person, to cease doing business with General Electric Company.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

a. Post at its offices and meeting halls in Louisville, Kentucky, copies of the notice attached hereto as an Appendix.[8] Copies of said notice to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the Respondent be posted by it immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material;

b. Furnish to the Regional Director for the Ninth Region signed copies of the notice attached hereto as an Appendix for posting by General Electric Company, R. J. Heffernan Company, Service Erection and Machine Company, Wehr Constructors Company, Garst-Receveur Company, Liberty Engineering and Manufacturing Company, and Hatfield Electric Company, they being willing, at places where they customarily post notices to their employees.

c. Notify the Regional Director for the Ninth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. June 8, 1959.

BOYD LEEDOM, *Chairman,*
PHILIP RAY RODGERS, *Member,*
JOSEPH ALTON JENKINS, *Member.*
(SEAL) NATIONAL LABOR RELATIONS BOARD.

[8] In the event this Order is enforced by a decree of the United States Court of Appeals, the Notice shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

JOHN H. FANNING, MEMBER, concurring:

I concur in the foregoing decision that the picketing of Gate 3-A by the Respondent Union constituted a violation of Section 8 (b) (4) (A). In reaching this conclusion I rely principally upon the *Moore Drydock* decision, 92 NLRB 547. I am, of course, aware of the factual distinctions between that case and the instant case. As the Trial Examiner points out, picketing in the Moore Drydock case occurred at a secondary employer's premises, which harbored a ship of the primary employer. Unlike the Trial Examiner, however, I am not persuaded that these factual differences are sufficient to render inapplicable the standards for permissible picketing set forth in that case. As I read the *Moore Drydock* decision, it was the intent of the Board to establish reasonable rules permitting, on the one hand, the publication through picketing of a dispute between a union and an employer and forbidding, on the other hand, the enmeshment insofar as possible of neutral employers in controversies not their own. In my opinion, the *Moore Drydock* decision represents a commendable attempt to achieve a fair balance between dual congressional objectives. I do not believe it should, or was intended to, be restricted to a situation where the picketed premises are owned legally by the secondary employer. Applying the four principles[9] of the *Moore Drydock* case to the in-

[9] In *Moore Drydock* the Board held that picketing the premises of a secondary employer was lawful if the following conditions were met: (a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* (d) the picketing discloses clearly that the dispute is with the primary employer.

stant case, I must conclude that the picketing at Gate 3-A, which was used exclusively by employees of neutral employers, was not reasonably close to the *situs* of the labor dispute with General Electric and that picketing at this Gate did not clearly disclose that the dispute was only with General Electric and had not been extended to the neutral employers of the employees using that Gate.

Dated, Washington, D. C., June 8, 1959.

JOHN H. FANNING, *Member,*
NATIONAL LABOR RELATIONS BOARD.

[1] **Stenographic Transcript of Testimony at Hearing of September 22, 1958.**

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
NINTH REGION

—o—

In the Matter
of
LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (AFL-CIO),
and
GENERAL ELECTRIC COMPANY, APPLIANCE AND TELEVISION RECEIVER DIVISION.

Case No. 9-CC-158.

—o—

Courtroom No. 1, U. S. Post Office Building,
Louisville, Kentucky,
Monday, September 22, 1958.

Pursuant to notice, the above-entitled matter came on for hearing at 10:30 o'clock a. m.

Before: A. Bruce Hunt, Esq., Trial Examiner.

Appearances:

John H. Rogers, Esq. and John H. Arbuckle, Esq., 6 East Fourth St., Room 1200, Cincinnati, Ohio, appearing on behalf of the General Counsel, National Labor Relations Board.

Herbert L. Segal, Esq., 403 Republic Building, Louisville, Kentucky; Benjamin Sigal, Esq., General Counsel, IUE

International, 1126 16th St., N. W., Washington, D. C.; and John Johnson, President, Local 761, IUE-AFL-CIO, 5153 Poplar Level Road, Louisville, Kentucky; on behalf of the Respondent.

W. L. Clay, Jr., Esq., Attorney, General Electric Company, Appliance Park, Louisville, Kentucky, on behalf of the Charging Party.

[3] PROCEEDINGS

* * *

[9] Mr. Rogers: I should like to amend the Complaint in the following regard, as to the name of two of the Employers appearing therein:

In Paragraph 3(a), I should like to amend the name of Wehr Contractors, Inc., to Wehr Constructors, Inc.;

And in Paragraph 3(c), I should like to amend the name R. J. Hefferman Electrical Contractor to R. J. Heffernan Electrical Contractor.

Trial Examiner: Spell it.

Mr. Rogers: H-e-f-f-e-r-n-a-n.

And likewise thereafter wherever those names appear in the Complaint I should like an appropriate amendment for each to reflect the proper name.

Trial Examiner: All right. I suppose there is no objection?

Mr. Segal: No objection.

Trial Examiner: I grant the motion.

* * *

[10] Mr. Rogers: This is the stipulation as discussed by General Counsel and Counsel for the Respondent:

Stipulations.

That on July 27, 1958, Local 761 called a strike of its members against General Electric Company, Appliance and Television Receiver Division, at Appliance Park, in Louisville, Kentucky, and pursuant to said strike picketing occurred at all [11] of the gates of the Employer's premises, including a gate designated and known as Gate 3-A, from July 27, 1958 to August 9, 1958, at about 1:30 p. m., when pickets were removed from Gate 3-A only pursuant to a temporary restraining order issued by the United States District Court for the Western District of Kentucky.

Thereafter, on August 10, 1958, at about 9:00 p. m., Local 761 called off the strike and all picketing ceased.

Mr. Segal: It is so stipulated.

Trial Examiner: All right, is there agreement on behalf of the Company?

Mr. Clay: Yes, sir.

Trial Examiner: I ask if you gentlemen are also in agreement that the Respondent Local has majority status in an appropriate unit at the local plant of the Company?

Mr. Rogers: It is so stipulated.

Mr. Segal: It is so stipulated.

Mr. Clay: It is stipulated.

Trial Examiner: Are you in agreement that the strike was an economic strike, as distinguished from an unfair labor practice strike, or do we have no issue on the point?

Mr. Rogers: I think there is no issue on the point, Mr. Trial Examiner.

I would also stipulate that Local 761, IUE, the Respondent Union herein, is the certified bargaining agent for the [12] production and maintenance employees of the Employer, the Charging Party, at its location in Louisville, Kentucky.

Trial Examiner: Well, that is an elaboration of the earlier statement, of course, that they have a majority status.

Mr. Rogers: Yes.

Trial Examiner: All right.

• • •

[13] Trial Examiner: Mr. Rogers, what are the numbers on the other gates?

[14] Mr. Rogers: The numbers of the other gates are 2, 3, 4 and 5.

• • •

[17] Trial Examiner: If I understand correctly, if the contractors and their employees used the same gates as General Electric employees, and anyone else who visited the plant, there would be no unfair labor practice?

Mr. Rogers: That is the understanding of the General Counsel. This Complaint is based upon the distinction.

• • •

---

[23] LESTER H. MEANS a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

• • •

[26] Direct Examination:

Q. (By Mr. Rogers) • • •

Q. In what capacity are you employed by this Company? A. I am Manager of Relations and Utilities Department in Appliance Park.

Q. That's in Louisville? A. In Louisville, sir.

Q. How long have you held that position? A. A little over a year; since July 1, 1957.

Q. And prior to that time what position, if any, did you hold? [27] A. I was manager of Employee and Community Relations at Appliance Park.

Q. And how long did you hold that position? A. For about five years, sir.

Q. And prior to that time how long had you been employed with General Electric Company? A. I have had a total of a little more than 35 years of service with the General Electric Company, a good deal of it at Schenectady, New York, and part of it with the Employee Community Labor Relations Group in New York City.

* * *

[28] Q. (By Mr. Rogers) Mr. Means, in your capacity as Manager of Relations and Utilities Department, do your duties in any way bring you in contact with plant protection? And, if so, in what way? A. Yes, one of the other sections is the utilities section that has to do with, and has the responsibility for plant protection.

* * *

[29] Q. Would you describe those premises, briefly? A. Briefly, we have a plot of land that contains approximately 1,000 acres, almost a square plot, about 10 miles south and east of the center of Louisville. That is what we have developed into what is known as Appliance Park. We have six large major manufacturing buildings, a large warehouse, and other buildings, a total of 13 buildings.

Q. Now, will you state for the record how entrance is gained [30] into Appliance Park, by what means? A. We have some main gates, as we call them, although we do not

have a fence around the property we have a big, large drainage ditch around the property which we feel gives us the necessary protection. There are gates 2, 3, 3-A, 4, and 5. Employees come in, by and large, through gates 2 and 5, which enter into a large, paved parking lot of some 65 acres.

Q. Will you state, for the record, what, if any, duties do the guards have with regard to these gates? A. The guards' responsibilities, in brief, are to direct traffic and see that only authorized persons enter the gates, that they enter the proper gates according to their designated places of employment; that they stop those who are not employees; that they look after visitors and direct them. In addition, of course, there is a fire protection responsibility.

* * *

Q. (By Mr. Rogers) Now, Mr. Means, I hand you a document which has been marked for identification as General Counsel's Exhibit Number 3, and ask you to state what that is. A. This is a reduced-scale plot plan of Appliance Park. I see it has been prepared by one of our designers. It indicates the locations of the various buildings, the entrances, the roadways surrounding the Park, the parking lots, [31] and things of that kind.

* * *

[34] Q. I will show you the photograph which has been introduced into evidence as General Counsel's Exhibit Number 2; and call your attention therein to a sign reading, "Gate Number 3-A. For Employees of contractors only. G. E. Employees use other gates."

Now, will you state for the record how long that sign has been there? A. That sign, or one similar to it, desig-

nating this as Gate 3-A for contractors and contractors' employees only, has been there since that entrance was made sometime in 1953.

[35] Q. Continuously? A. Yes, sir.

Q. Mr. Means, will you state whether or not there are any methods or means provided by General Electric to identify persons attempting to gain entrance to Appliance Park? A. Oh, yes.

Q. What means do you use? A. All employees who drive to work are issued an identification sticker for their car, a decal which they are told to attach to their windshield, and the type of decal, the color of it, the size, shape of it, determines where they may park and the entrances they may use.

All employees are issued an identification card. Visitors are issued an identification card which they stick in their coat pocket (indicating). Visiting employees are issued a—that is, employees from another plant, are issued a different color sticker, or card, that goes in their lapel pocket.

Contractors, their employees, are issued a temporary sticker rather than a decal for their windshield, something that is attached by a suction cup to their windshield; so that everyone who enters Appliance Park is identified in some way, we hope.

Q. Now, will you state for the record whether or not General Electric at any time has reduced this sticker system about which you have just testified—have they reduced that to writing in any way? [36] A. Oh, yes, it has been reduced to writing, back over some years.

Mr. Rogers: Will you please mark this for identification as General Counsel's Exhibit 4.

(Thereupon, the document referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. (By Mr. Rogers) I hand you a document consisting of four pages of mimeographed material, held together by a staple, bearing the date of May 29, 1957, and ask you to state what that is. A. This is an instruction or memorandum of information sent to two of the major mailing lists of supervisors in Appliance Park, concerning the identification, the windshield sticker identification for employees' cars.

I have here in my briefcase the copy of this that I received through the mail as a result of this being sent out.

Q. Will you state for the record whether or not the information contained in General Counsel's Exhibit Number 4 is an accurate reflection of the windshield sticker identification system presently in effect? A. It is.

• • •

[38] Q. (By Mr. Rogers) Mr. Means, with regard to the language pointed out by the Trial Examiner, will you explain for us what Gatehouse Number 3 is, and where it is located? A. Gatehouse Number 3 serves both Gates 3 and 3-A, in order to save some money. You might call it like a fork in the road where Gate 3, the employees and any trucks coming in that gate would stop at that gatehouse. Down the road about 100 yards is Gate 3-A, and, as designated on this plot plan, those who enter [39] Gate 3-A come past this same gatehouse. There are two guards at that gatehouse at all times, and they, of course, watch both entrances.

• • •

Q. (By Mr. Rogers) Now, Mr. Means, during the period of time you have been employed as Manager of Rela-

tions and Utilities Department, what policy, if any, and practice, if any, does the Company have with regard to the use of Gate 3-A? A. That has been exclusively for the use of contractors and employees of contractors.

Q. What, specifically, is the Employer's policy with regard to that gate and the use of it by employees of General Electric? A. Employees would be stopped and would be turned back, and [40] have been, because I have checked that with our guards and our chief of plant protection.

Mr. Segal: I object to that. It is hearsay. He doesn't know of his own personal knowledge. I move it be stricken from the record.

Trial Examiner: Strike out the words "Because I have checked that," and subsequent words in the answer.

• • •

[42] Q. (By Mr. Rogers) All right, Mr. Means, with regard to your duties as Manager of Relations and Utilities Department, what, if any, function do you perform with regard to independent contractors and their contracts? A. I have a responsibility for one of the departments in Appliance Park, and we enter into contracts with contractors for all of the things that involve the buildings outside of the six major manufacturing buildings, including the grounds, the parking lots, and all of those facilities, so that any contracts that involve any of the 13 buildings outside of the 6 major manufacturing buildings would come under my jurisdiction.

Q. Now, in what manner are any such contracts with independent contractors negotiated, on what basis? A. Our engineers would probably draw up the specifications, plans, what not, and through our purchasing section would

submit these to three or more competent contractors who would bid on the jobs, and the job would be let to a contractor as the result of [43] these bids.

Q. Now, let me ask you, with regard to any of these contracts with independent contractors, does your authority and responsibility relate only to the Relations and Utilities Department, or does it extend further than that at any time? A. From time to time one of the six operating departments might ask us to handle a contract for them, and so we have handled some major contracts with them involving conveyors, air conditioning, ventilating, or heating or electrical work. That is on request from the manager of that department.

Q. And can you state for the record, in general, what type of work is let out to independent contractors? A. Quite a variety of work. We have a large maintenance group of our own that does the routine day-in-and-day-out type of maintenance; but our appliance business is very much like the automobile business, every year we bring out a new model. Some departments bring that new model out in the summer; most of them in the fall; about August or September; so that we have a job of retooling, revamping our manufacturing facilities, installing new facilities, equipment, rearranging conveyors, and some of those major operations of that kind, maybe making a new foundation, installing a new press or series of presses, a major change in our conveyor system, a major change in our lighting, some of those things for which we do not have either the skill or the manpower, or the heavy machinery, perhaps, [44] necessary to perform the job.

We refinished a parking lot not long ago. We never do that kind of paving ourselves.

L. H. Means, for General Counsel, Direct.

Q. Now, with regard to contracts let to independent contractors, if any, by any of the other departments, or for any of the other departments, will you state for the record whether or not the Relations and Utilities Department lets all contracts wtih independent contractors for all of the departments at General Electric? A. Oh, no, that's the responsibility of each operating department. We would only do it at their request.

Mr. Rogers: That's all.

Mr. Clay: May I ask a few questions?

Trial Examiner: Yes.

DIRECT EXAMINATION

Q. (By Mr. Clay) Mr. Means, how far from Louisville is Appliance Park? A. It is approximately 10 miles from down town Louisville.

Q. How do the employees and contractor personnel go to Appliance Park? A. Ninety-nine percent in their own personal car or in somebody else's car. They drive. There is bus service, but very few employees ride the bus. No one walks.

Q. Just for the record, would you list briefly the types of appliances, products, made at Appliance Park? A. Building 1 makes washers and driers, and a combination [45] washer and drier; Building 2 makes ranges; Building 3, dishwashers and Disposalls; Buildings 4 and 5 make the household refrigerators and freezers; and Building 6 makes the room air conditioners.

• • •

CROSS EXAMINATION:

Q. (By Mr. Segal) Mr. Means, there is no question in your mind but that a strike situation is not a normal situation at General Electric, Appliance Park, is that correct, sir? A. Yes, that's correct.

* * *

[46] Q. Now, the strike not being a normal situation. did the employees who came to work do any of the work in this maintenance area, or do any of this maintenance work, those that went [47] to work during the strike? A. We had maintenance employees who came to work who did maintenance work.

Q. And they are G. E. employees? A. Yes.

Q. Now, you introduced some exhibits; I think they were tendered and finally accepted. First of all, directing your attention to Number 3, the map, the actual map itself refers to these gates that we are talking about here as B and C, is that correct? A. Yes.

Q. B there is Gate 3, C is 3-A. * * *

[52] Q. (By Mr. Segal) Now, Mr. Means, this document was sent out, I assume, over the signature of H. J. Benzie, is that correct, sir? A. That's correct, yes.

Q. To whom did this document go? A. That went to a large portion of the supervisors. That went to an L-1 mailing list, through L 8.

Q. Tell us— A. That meant it went to, I believe, all exempt employees of Appliance Park.

Q. All exempt employees? What does that term mean? A. That means all supervisors—

Q. Oh, I see, I see. So the document went to super-

visors, [53] not employees of—production and maintenance employees? A. That is correct.

• • •

[56] FURTHER DIRECT EXAMINATION

Q. (By Mr. Rogers) Mr. Means, I show you a document which has been marked for identification as General Counsel's Exhibit 5, and I ask you to state what that is. A. This is a plant protection bulletin, Number 9, issued January 20, 1954, signed by E. W. Ernst, Appliance Park Project, who had responsibilities in connection with plant protection at that time. This relates to the use of Gate 3-A by contractors and contractors' personnel. This was issued and sent to a long list of supervisors whose names appear at the heading.

• • •

[57] CROSS EXAMINATION (Resumed):

Q. (By Mr. Segal) Now, this last document which has been introduced by General Counsel, the Bulletin of January 20, 1954, was not distributed to the employees of General Electric, is that correct, sir? A. It was not, not to all employees, but distributed to—

Q. To your supervisors? A. Yes.

Q. Now, there is no place contained in that document that General Electric employees shall not use Gate 3-A? A. I can't say without reading it in detail. This was not aimed at that purpose, I agree.

• • •

[58] Q. Well, I call your attention, therefore, again to General Counsel's Exhibit Number 4, where no difference

is made between Gate 3. In other words, there is no breakdown between Gates 3 and 3-A, whereas in your document of January 20, 1954, apparently Gate 3-A is specifically designated. A. The confusion, I think, in your mind, Mr. Segal, comes from— This reference is to Gatehouse Number 3, not Gate Number 3. There is a gatehouse that serves two gates.

Q. Yes, I appreciate that, sir, but I call your attention to the next page of General Counsel's Exhibit Number 4, which sets out the gates by name—or by number—I am sorry, it is page number 3—as Gates 2, 3, 4 and 5, with no breakdown of Gate 3 into 3 and 3-A. Is that correct, sir? There is no breakdown? A. It doesn't mention 3-A there, because this was directed to employees, not to contractors. This was telling employees what gates they should use.

Trial Examiner: You mean supervisors?

The Witness: No, all employees. This went to supervisors, but the reason we did not mention 3-A here is that this had to do with the decal system we put on the windshields.

• • •

[59] Trial Examiner: Did you say just a moment ago that this document was also distributed to production and maintenance employees?

The Witness: Oh, no, none of these have been distributed to them.

• • •

Q. (By Mr. Segal) Now, directing your attention back to your affidavit of August 5, 1958—the last page, if you have it—you say, "Persons employed by contractors and their sub-contractors at the plant are required to have

identification badges which they are required to wear." Do you see that, sir, in the second paragraph? A. Yes.

Q. Now, that is not a true statement, is it? A. To the best of my knowledge it is.

Q. Do you recall Mr. Gatton testifying that the badge system had been abandoned? A. So far as employees are concerned, that is correct.

• • •

[60] Q. Actually, isn't the identification card the employees carry, isn't that for the employees' store? A. That's only one of the purposes; but any person that we see on our premises that we do not know, we ask him to identify himself. If he is an employee he has an identification card.

Trial Examiner: How many employees are there?

The Witness: Ten thousand, five hundred, at the moment.

• • •

[62] Q. (By Mr. Segal) Mr. Means, you told us that there was a [63] large drainage ditch that surrounds the plant; is that correct? A. That's right.

Q. Now, there is no fence, as such, surrounding the—what is it, 1,000 acres? A. One thousand acres.

Q. And this drainage ditch doesn't have water in it unless you have a great, great rain, or something of that sort, is that right? A. From time to time it has water. See, that ground out there is very flat. We had to make this drainage ditch in order to drain the property.

Q. In any event, someone can cross on foot, that's what I am trying to say. A. Yes; they can't drive on it, but they could walk.

• • •

[64] Q. (By Mr. Segal) Now, these two bulletins that we have referred to, were they posted on any employee bulletin board? A. No, but they were used as subject for informative meetings, that's why they were distributed so widely to supervisors.

• • •

Q. You know that you got copies. Now, directing your attention [65] to the plants themselves, there are, what, five, six buildings? A. Six manufacturing buildings; a total of 13.

Q. And these contractors, for the most part, the majority of their work—that you said were left, and who are involved here, were contracted to do business and to do their work in the plant, in the plant proper, is that correct, sir? A. A majority of it, but not all of it.

• • •

[66] Q. (By Mr. Segal) Now, Mr. Means, this work that was done, or was to be done, did this encompass all the buildings in the plant—or all the buildings on the site, I mean by that buildings, or plants 1 through 6? A. I can't say that every building had something to do, but most of them did.

• • •

Q. So that contracting employees moving through the gate would park—he would park his car—I am assuming they are all males—and then they would go into the respective buildings in which they were supposed to work? A. Yes, they parked back of the buildings as I designated them.

Q. Now, during the strike—I mean by that when the

picketing was going on—the production and maintenance people were on strike, there were some employees, production and maintenance employees who did not respect the picket line, is that correct, sir? A. Yes; over 2,000 of them.

[67] Q. Yes; and these people also worked—accepting, just for the sake of the question, the number—also worked in these respective buildings; is that correct, sir? A. Yes.

* * *

Trial Examiner: What is that?

The Witness: There were no contractors in during the strike. They wouldn't cross the picket line at Gate 3-A.

Q. (By Mr. Segal) But the question was, they were working in the same general area that the contractors, or those employees would have worked, is that correct? A. Oh, yes, yes.

* * *

Q. Can you tell us, sir, whether or not in Building Number 2 [68] the painters went in and did their work? Do you know that to be a fact, or not to be a fact? A. I do not know.

Q. You just don't know? A. I don't know.

Q. Now, there is no permanent building for the contractors on the premises, is there? A. No.

Q. Did you keep any record of how many employees, or how many contracting employees went through Gate 3-A? A. During the strike?

Q. Yes, sir. During this period that we are talking about. A. During the period of the strike, to the best of my knowledge, none.

Q. You are saying that no cars at all went through Gate 3-A, is that what you are telling us? A. I heard some testimony in Federal Court the other day that the pickets have passed one or two cars to come in to pick up their tools, but did not pass people to come in and work.

Q. In other words, your testimony is that except for these one or two cars that's all the cars that went through 3-A, is that right? A. As far as I know.

Q. As far as you know; all right.

How close is the gate designated by you as 3-A to Gate Number [69] 3, if you know? A. Oh, a couple of hundred feet, roughly.

Q. Pardon, sir? A. Roughly, I would say. Four hundred feet.

Trial Examiner: Let me see that.

The Witness: See, these are marked (indicating). Here is 2200, 450-500 feet.

Trial Examiner: This cross (indicating) is the point? This cross?

The Witness: Yes.

Trial Examiner: All right, then, that would be about 1750.

The Witness: About 650 feet. About 550. It is 550.

Trial Examiner: All right, it is 550 feet, approximately.

• • •

[70] Q. Directing your attention to the contractor's employees and their cars, it is conceivable that more than one could be in a car, that they could have four or five, a group, riding together? A. Oh, yes.

Q. So that when that contractor's employees' car goes

in he could let individuals off at places closest to their work station? A. Oh, yes.

Q. And, of course, contained in the contracting employees' car could be General Electric employees, isn't that true? It is possible, isn't it? A. It is possible to smuggle one in.

• • •

[71] RE-DIRECT EXAMINATION:

Q. (By Mr. Rogers) • • •

[72] Trial Examiner: Mr. Segal, you do not contend that there are any entrances other than Gates, 2, 3, 3-A, 4 and 5, and you do not contend that any vehicle can get in that property, any automobile can get in that property by any other entrance or any other means?

Mr. Segal: Just one second; Mr. Johnson wants to explain something to me.

I think your statement, sir, is generally correct about the automobiles. I am informed there is a gate in back of what is known as Fegenbush Lane, which I think it is identified there, which now has a log lying in front of it, and I don't think it is generally in use any more, but subject to that reservation [73] the statement is correct as to the automobiles.

• • •

Q. (By Mr. Rogers) Now, Mr. Means, with regard to the drainage ditch which surrounds Appliance Park, would you briefly describe it as to width and depth? A. It varies as to width and depth, but in places it is 25 to 30 feet wide, and as much as 6 or 8 feet deep.

• • •

RE-DIRECT EXAMINATION:

* * *

[74] Q. (By Mr. Clay) Mr. Means, did you hold any informative meetings, or attend any informative meetings when bulletins of this kind were discussed with the employees? A. Yes, sir. I have held them myself, and I have attended some. Traditionally—One of my responsibilities is communications with employees, and all—

Trial Examiner: You have answered the question.

Q. (By Mr. Clay) Are the contents of such bulletins communicated by the supervisors to those attending such meetings? A. Generally, yes.

Q. Mr. Means, reference is also made by the attorney for the Union with respect to a paragraph in General Counsel's Exhibit Number 4 relating to Gate 3-A, and I think you quoted a sentence reading, "In the event of labor difficulties with the various A. F. of L. Craft locals this separate entrance gate for direct contractors' employees should also minimize the possibility of picketing our regular entrances, Gates 2, 3, and 5 used by G. E. [75] employees."

Since you have been at Appliance Park have there been jurisdictional strikes by unions representing contractor personnel? A. There have been a total of 22. That is why we established Gate 3-A.

Q. And I take it from what you said that the need for that gate was felt? A. It was; early in the days of Appliance Park the contractors came in the same gate as our employees; and on some of these jurisdictional disputes they set up pickets that kept our employees out as well

as employees of the contractors, so we established a separate gate for contractors.

Q. Did you also feel that it was important that these gates be used only by those for whom they were designated? A. Very important. That's the reason we did it.

* * *

[83] Trial Examiner: * * *

I have before me what appears to be the transcript in Civil Number 3665, entitled Fraker against Local Number 761, the Respondent in the case today. The date of the proceedings is September 18, 1958, and they occurred in the local United States District Court.

Among the witnesses testifying were Arnold Tupuritis, Benjamin Charles Johnson, Richard J. Long, James S. Mapier, and James F. Wilson.

I understand that counsel stipulate now that if the five individuals I named were called as witnesses in this proceeding and were asked the same questions as were asked of them in Civil Number 3665, that they would give the same answers as they gave in that proceeding.

Is that a correct statement of the stipulation insofar as I have stated it?

Mr. Rogers: Mr. Trial Examiner, with the exception that [84] the one witness' name, although it appears as "Long," his name is really Richard J. Lang, your statement is correct.

Trial Examiner: With the modification stated by Mr. Rogers, is the stipulation agreeable?

Mr. Segal: It is agreeable.

* * *

[85] Trial Examiner: • • •

Among the other witnesses in Civil Number 3665, there are two persons named John Gatton and Sylvester D. Comstock. I understand that counsel enter into the same stipulation with respect to the testimony of Mr. Gatton and Mr. Comstock with the proviso that anybody here may call Mr. Gatton or [86] Mr. Comstock or both for further testimony in this proceeding.

Is that a correct statement?

Mr. Rogers: Yes, sir.

Mr. Clay: Yes, sir.

Mr. Segal: That's correct.

• • •

[88] (The testimony of John Gatton, Arnold Tupuritis, Sylvester D. Comstock, Benjamin Chas. Johnson, Richard J. Long, James S. Napier and James F. Wilson, as follows, is copied from transcript in Civil Action Number 3665, United States District Court, Western District of Kentucky at Louisville, per stipulation hereinbefore recited.)

JOHN GATTON was called as a witness by counsel for the petitioner, and after having been duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Schurre) Mr. Gatton, are you employed by General Electric? A. I am.

Q. What position do you occupy? A. I am Lieutenant, Plant Protection, I am a shift supervisor.

Q. How long have you held that position? A. Since July, '54.

• • •

[89] Q. Will you state what instructions you have received concerning the use of those gates? A. We have informative bulletins that we issue from time to time that cover the use of the gates, what entrances certain people can use for different things, the guards are briefed on those points. If they are assigned to a particular post regularly, they are briefed in detail concerning that post. In addition, all are given copies of bulletins or anything to go into a manual that they have.

Q. I show you Petitioner's Exhibit 2 and ask you if you and the force of guards received that circular or bulletin? A. Yes, sir, we did.

Q. Are guards stationed at all gates at all times? A. The guards are stationed so they can control traffic at all gates whenever they are open. I might add that we close certain gates at certain times.

[90] Q. What instructions have you received particularly with respect to the use of Gate 3-A? A. Gate 3-A was set up and was used solely by contractor personnel.

Q. How do you insure that G. E. employees can't enter or don't enter that particular gate? A. The contractor employees are issued a certain type sticker that can be recognized from a reasonable distance, as contractors.

Q. Do you mean a sticker for their automobile? A. Yes, sir, in addition to that, if the guard doesn't recognize the individual as having come in previously as a contractor employee, he is stopped and questioned on that point.

Q. Has the company issued various types of stickers

and badges to be used by employees as well as contractor employees? A. They have, sir.

Q. Do you have them here? A. Yes, sir.

Q. Will you take from that the various stickers and badges and briefly describe them after showing them to the Court and counsel for the respondent, how they are used? A. We have two main type stickers, basic types. One is a plastic suction cup used by the contractor personnel, and the [91] other is a decalamania type. The white plastic suction cup type is used by the contractor employees or hourly employees. The red plastic suction cup type is used by contractor supervision. The difference is the contractor supervision will have certain roving privileges from one building to another, outside the contractor parking lot.

The white plastic suction cup restricts that man to the contractor lot and nowheres else.

On the employees, General Electric employees type sticker, the white sticker states on there to be used for Gates 2 and 5. It is a plain white decal, it is placed on the windshield.

The utility building parking sticker is a white decal with a blue triangle, and it grants the privilege of using Gates 2, 3, 4 and 5.

In addition to that, we have what we call an unrestricted sticker, which permits using Gates 2, 3, 4 and 5, and also the privilege of parking adjacent to the manufacturing building. The first two are not permitted to park adjacent to the manufacturing building.

Q. What about badges, are they issued to be worn by contractor employees or G. E. employees? A. We tried the badge system out, and we found it was impractical.

* * *

[92] Q. Without going into that, the system of identification that has been current is the sticker system? A. Yes, sir.

Q. Does the guard group keep certain records and files with respect to incidents that may occur at any of these gates? A. Yes, sir, an indice file is kept.

Q. Do you have a registry of contractors who were working at Appliance Park? A. Yes, sir, we have a registration system. We have a card that is filled out by the employees in the presence of a guard on the gate.

Q. The contractor's employees? A. Yes, sir, that states the make, and the model of the vehicle they are driving, whose name it is registered in, and the sticker is issued to that vehicle.

Q. Have you received any reports of any employee of General Electric trying to use Gate 3-A to enter the Park?

* * *

[93] The Witness: Yes, sir.

Q. How do these reports come to you? A. As mentioned before, I maintain what we call an indices file, and I receive reports from time to time of any incidence like that.

Q. Are they recorded? A. It depends—if it is an offense where an individual attempts to go ahead and use a particular gate when he is requested not to, then a report is made on it. However, if an employee, through ignorance, if nothing else, attempts to use a gate, the reasons for that are pointed out and we found we get awful good cooperation from explaining why we have that rule.

Q. This explanation is made when, after he entered, or when? A. No, sir, if he is attempting to enter, he is not permitted to enter a gate that he is not authorized to use.

J. Gatton, for General Counsel, Cross.

Q. During the strike, were you present at Gate 3-A at any time? A. Periodically I was present at Gate 3-A.

Q. Were you there on the first day of the strike? A. Yes, sir.

Q. July 28th? A. Yes, sir.

Q. Were you at Gate 3-A? [94] A. Yes, sir, I visited Gate 3-A.

Q. Will you describe how many pickets were there and what they were doing? A. On Monday, July 28th, there varied between 25 and 29 pickets throughout the morning hours of that day. There were two signs, two picket signs.

Q. I show you Petitioner's Exhibit 1, and ask you if this is the sign that was carried? A. I would say it was a sign similar to that, I couldn't say that is the sign, I would say it was one similar to that.

* * *

[95] CROSS EXAMINATION

Q. (By Mr. Sigal) * * *

[96] Q. Now, you go through Gate 3-A, don't you? A. No, sir.

Q. You do not. A. Only time I go through Gate 3-A is like we have a washout or the road is damaged, on an inspection tour only. No other time do I use Gate 3-A.

Q. You would say that in emergency you would go through Gate 3-A? A. Using the official car, yes, but that would be the only [97] reason I would.

Q. Would you say there are not emergencies when other officials of G. E. would go through Gate 3-A? A. They would not, they would be stopped.

Q. Officials would be stopped? A. Yes, sir.

J. Gatton, for General Counsel, Cross.

Q. Mr. Means wanted to go through Gate 3-A, he could not go through? A. No, sir.

Q. Is that in your instruction? A. Yes, sir.

* * *

[98] Q. Now, with regard to the sticker which is used by the contractor's employees, where is this sticker placed on the car on which this is used? A. We recommend placing it on the windshield immediately in front of the rearview mirror,—in other words, between the windshield and the rearview mirror.

Q. Is that for the convenience of the guard? A. Yes, sir.

* * *

[99] Q. All right, now, when the car passes down this gateway entrance, where does it go? A. It goes past Gatehouse number 3. That is the location where the guard is stationed regularly during normal periods, Gate 3, Gatehouse 3.

Q. How far is that from the entrance? A. From Gate 3-A entrance?

Q. Yes. A. Approximately 350 feet.

* * *

Q. Well, all right, give us his itinerary when he enters the gate? A. All right, he enters the gate. The guard located adjacent to the Gatehouse number 3 checks the individual to make sure he is a legitimate holder of the contractor sticker, and after a time they recognize any number of them as regular contractor employee.

Q. He checks the driver of the car? A. And his passengers. In other words, each individual, when they come in like that, generally the supervisor of that company will

notify the guard on the gate, either through plant engineering or through the plant protection office, [100] that there will be so many men in. We don't necessarily know their names to begin with. Then, when they arrive there, they are registered in, whether they are riders or passengers in the automobile, or whether they are the driver. They are registered in on a card.

Q. On whose card? A. On our card.

Q. Well, now, there is no obligation for a driver of a car to have the same passengers every day, is there? A. No, sir, but if they are not recognized as *bona fide* contractor employees, they are not permitted to enter.

* * *

[101] Q. Now, so far as any particular person in a car is concerned that is not the driver, if he says to the guard that he is an employee of the contractor, that ends the conversation, doesn't it? A. No, sir, if the guard is not sure, he checks the registration card.

Q. After he has identified the person. A. Yes, sir.

Q. And you say this would require some days, would it not, before a guard would be able to recognize the people who are in the cars as being regular employees of a contractor? A. Not necessarily. Most of our contractor employees have been around there for some time. They work for the same companies, and you grow to recognize them on sight.

Q. After a time? A. Yes, sir.

Q. After the first day of the strike, July 28th of this year, how many pickets were located at Gate 3-A? A. Three, three pickets were located there.

Q. And was that the same every day thereafter during

the continuation of the strike? A. Other than when they would be relieved, and sometimes if they were relieving, there would be four there for a short period. Basically, there were three pickets there.

* * *

[102] Q. I see. After—beginning July 29th, there were three pickets at every gate? A. Yes, sir.

* * *

Q. I am asking this, Mr. Gatton, was the picketing at Gate 3-A any different in any respect from the picketing at any of the other gates? A. No, other than the point I mentioned.

* * *

[103] RE-DIRECT EXAMINATION

Q. (By Mr. Schurre) Were you at Gate 3-A at any time during the picketing when contractors attempted to enter through Gate 3-A? A. On August 6th, I was at Gate 3-A when—

Q. Will you state what happened? A. Well, there were three cars, I happened to be down there, I didn't know they were even there until they was already through. They caught the pickets when they were off to the side, and the three carloads of Kirchdorfer and Howell employees came through the gate.

Q. Was that the only occasion you happened to be present when contractors attempted to enter? A. Yes, sir. * * *

[104] Q. When entering Gate 3-A, does the car have to pass the guardhouse? A. Yes, sir.

Q. Little brick guardhouse which is in back of Gate 3?

Is that right? A. It is at the intersection of Gate 3-A and Gate 3.

• • •

Q. Is it possible for a G. E. employee or official to enter Gate 3-A and proceed into the plant? A. You mean legitimately?

Q. Yes. A. No.

Q. They would be stopped? A. They would be stopped.

Q. And turned back? [105] A. Yes, sir.

Q. Has that been done to your personal knowledge? A. Any number of times, yes, sir. Plant engineering employees have been turned around.

• • •

EXAMINATION by the Court:

• • •

Q. What are these gates a part of, a fence or barrier that mark off the thousand acres or the sixty-five acre parking lot, or what? A. We have large drainage ditches that encircle the park. Where these gates are located, we have large culverts which have the pavement over the top. In other words, it would be very difficult for a vehicle to obtain access to the park due to these large drainage ditches that you could set a vehicle down into and still couldn't see the top of. So, at the gates we have the culvert and the pavement.

• • •

[106] Q. Well, there is no barrier or fence to keep people from going on it anywhere? A. No, sir, that's the reason we have our patrols.

Q. They patrol the boundary? A. They patrol throughout the plant site.

* * *

---

[107] ARNOLD TUPURITIS was called as a witness by counsel for the petitioner, and after having been duly sworn, was examined and testified as follows:

Direct Examination:

[108] Q. (By Mr. Schurre) * * * Will you state your occupation? A. I am a carpenter.

Q. And by whom are you employed? A. Wehr Construction Company.

* * *

Q. Were you assigned to work at Appliance Park some time before July 28th? A. Yes, I worked two days before, Thursday and a Friday before July 28th.

Q. Were any other employees of Wehr with you? A. Two laborers.

[109] Q. Two laborers. What are their names? A. One is Lonie—I don't know his other name.

Q. Would you say it was Terry? A. Yes.

Q. Lonnie Terry? A. Yes.

Q. And one other. You know his name? A. No, I don't know that.

Q. You know whether they are union members? A. Yeah, I suppose so.

Q. Now, did you go back to work there at Appliance Park on July 28th? A. Yeah, Monday morning.

Q. Were you alone? A. No, had two laborers with me.

Q. Had two laborers with you. A. Yes, sir.

Q. Was it your car you were driving? A. Yes, my car.

* * *

Q. Was this car you used on that occasion, did it carry a [110] sticker? A. Yes, sir.

Q. The kind that was described in court this morning? A. Yes, contractor sticker.

Q. What time of morning did you arrive at Gate 3-A? A. It was around seven o'clock in the morning.

Q. Will you describe what you saw and what happened? A. I pulled up to the Gate 3 and tried to turn in.

Q. Gate 3? A. Gate 3-A, contractor's entrance, and there was a solid crowd of people out there. So, I pointed at the sticker, thought the contractor sticker would let me go in, the boys didn't ask me anything, shook their heads, and that was all.

Q. Shook their head? A. Shook their head, like no. Of course, I wouldn't drive—there was a big crowd of people, and there was a policeman on the road, and he told me to move ahead, don't stop the traffic. So, I kept going ahead.

Q. And you didn't enter the plant that day to do any work? A. I couldn't do that.

Q. Did you go back there? To finish the work you were doing? A. No, I called up the company and they told me to go down to the project on Greenwood Road, school job.

Q. Did you and your co-workers, laborers, go back to work out there after the pickets ceased at Gate 3-A? [111] A. Yes, I took them along with me.

Q. Did you go back to work after the pickets stopped? A. No, I wasn't there.

Q. You have been working on some other job? A. Yes.

Q. Approximately how many people were around that Gate 3-A that morning? A. Oh, I couldn't say for sure, but approximately around thirty, probably.

Q. Would you say you couldn't drive through without hitting them? A. No, I could not.

• • •

CROSS EXAMINATION:

Q. (By Mr. Sigal) Mr. Tupuritis, did you go back to the plant on July 29th? To see if you could get in. A. No, I got my orders from my superiors, and they didn't tell me to go back.

Q. You have never gone back there? A. No.

• • •

SYLVESTER D. COMSTOCK was called as a witness by counsel for the petitioner, and after having been duly sworn, was examined and testified as [112] follows:

Direct Examination:

Q. (By Mr. Schurre) • • •

Q. What is your occupation? A. I am an electricia.

Q. By whom are you employed? A. By the R. J. Heffernan firm.

• • •

Q. Did Heffernan have any work to do for General Electric at its Appliance Park plant, around July 28th? [113] A. Yes, sir.

Q. Were you assigned to perform any of that work? A. I was.

Q. When had that work commenced? A. That work, that phase of the work started approximately last October.

Q. 1957? A. Yes, sir.

Q. Will you describe the kind of work your firm was doing? A. Well, this is something new. This is the second kind of a job, of its kind, that has ever been built, and the first one isn't even completed yet. That is being installed in the Navy Yards in Washington. This is called the Stromberg system. This deals with the cables and it is kind of intercommunicating on time cards or punch cards, that records what the men have done on the various presses and things. At the same time, we were also completing what is known as the Hancock system.

Q. Is that an electrical system, too? A. Yes, sir.

Q. Are they both rather complicated? A. Yes, sir.

Q. Require special skills? A. Yes, sir.

Q. Over how long a period of time has Heffernan Company been engaged in doing work at Appliance Park? [114] A. We have been at Appliance Park approximately five to six years, practically regular.

Q. You had a work force there almost continually? A. Yes, practically, maybe off a day here and there.

Q. How big was that work force? A. Well, we had anywhere from one man on up to fifty men there, from various times.

Q. Under your current contract with G. E., for how long a period in the future does Heffernan expect to be engaged in work at the plant? A. Well, this system I am installing now, the main parts of it won't be delivered until the last of November of this year.

* * *

Q. You said the parts won't get there until November? A. Well, we have been working on this on and off since last year. I have had four men working there for the last month.

[115] Q. Just prior to July 28th, how many employees of Heffernan were at work at Appliance Park? A. On the Friday before the strike, there were three of us there.

Q. Were you assigned to go back there on July 28th? A. Yes, sir.

Q. Any other employees? A. Yes, sir, two other ones, the same men.

Q. Will you name them? A. Dennis Lee Schamore and Henry A. Fust.

Q. Did you three go to the Park together? A. Yes, sir.

* * *

Q. Does your car have a contractor sticker? A. Yes, sir.

Q. Is it there all the time? A. Yes, sir.

Q. Have you been told anything about the use of Gate 3-A? A. Yes, sir.

Q. By whom? A. By the guards, the first day I went there.

Q. That was back in 1957, did you say? [116] A. Oh, fifty—I don't know, one or two, or three, along somewhere in there.

Q. On that morning of July 28th, you drove directly to Gate 3-A. A. I did, yes, to Gate 3-A.

Q. Will you tell what you saw and what happened? A. Well, it was a large body of men and they were carrying signs, part of them were, and I asked if I could enter.

Q. Where were these men standing or moving with rela-

tion to the entrance? A. Well, they were standing a bit back off the roadway, and I could pull off of the main road by them, by these men, this line of men, and I asked them if I could enter, and they said no. So, I asked them if I could go in and get my own personal tools and they said no. I asked who was in charge, and they said no one was. So, I asked them where their union office was, and I was told over on Poplar Level Road.

So, I drove to their union office and I went in, asked who was in charge and I was referred to the second office on the left at the rear of the building, and I talked to some lady there.

I showed her my union card and asked her if I could get a permit or a pass to get through there to get my own personal tools. I can't work without tools. So, she said well I don't know, you have a seat and then someone will talk to you. So, [117] in a few minutes, I talked to a Bob James, and I showed him my card and I told him I would like to get in to get my tools, and he said sure.

He wrote me a note, and he said give it to some one, he called his name, I don't know it now, and if that he isn't there, show it to anybody on the gate, and I did that, and the line opened up and I went in and I got my tools. The two men that were with me went in with me and we got our own personal tool boxes and left the plant.

Q. And did you have to surrender the pass to the pickets? A. No, sir.

Q. These two men that were with you, were they members of the union? A. Yes, sir.

Q. You recall what the pass said? A. It said "Please admit this man to pick up his tools in building one."

S. D. Comstock, for General Counsel, Direct.

Q. Did you have any conversation at all with Bob James? A. Only to tell him who I was and what I was asking for is all. Then this man, this Bob James, says, why sure, and he got a little card and then wrote it on there, and I left.

Q. Did he make any reference to the construction work at Appliance Park? A. At that time, no, sir.

Q. Did you go back to work there at any time? [118] A. I did not.

Q. While the picketing was going on? A. I went back on Tuesday, the 29th, after we loafed on the 28th, and we were replaced and we were sent to Eastern High School.

Q. You were assigned to another job? A. Yes, sir, we same three men, and we keep our regular working tools that belong to my boss in our gang boxes out there, at Appliance Park, we keep our welder and our carts and our ladders and things chained up.

So, I placed the two men at Eastern High School on Tuesday morning and I come back to the Appliance Park at Gate 3-A, to get some of the boss's personal tools. There were only three pickets there. I asked one of them if I could go in, and he said no, and I said well now I went to the union office on Monday morning and I got a pass from Bob James, and I picked up my own personal tools.

This fellow asked me how long would I be in there and I said maybe thirty minutes. So, the three of them let me through.

I picked up our ladders, benders and materials and I had to go to planning engineering office to get a pass or permit through to get out of the plant with any material that we haul or any tools that we haul on our trucks.

* * *

S. D. Comstock, for General Counsel, Cross.
B. C. Johnson, for General Counsel, Direct.

[119] Q. You didn't work there any time during the picketing? A. No, sir.

CROSS EXAMINATION:

Q. (By Mr. Sigal) If I understand you correctly, you did not return to Appliance Park after July 29th, during the strike period? A. After July 29th, yes, sir, I did not.

Q. On what day did you return? A. On the Monday morning after the strike was settled on the news on Sunday night, and I took five men in on that Monday morning.

* * *

---

[120] BENJAMIN CHARLES JOHNSON was called as a witness by counsel for the petitioner, and after having been duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Schurre) * * *

Q. What is your occupation? A. Brick mason and tender.

Q. Brick mason and tender. A. Yes.

Q. By whom are you employed? A. Liberty Engineering.

Q. Is the full name Liberty Engineering and Manufacturing Company? A. That's right.

* * *

[121] Q. Were you assigned to do any work at Appliance Park prior to July 28th of this year? A. I was told to come to Appliance Park to go to work August 4th.

Q. August 4th? A. Yes.

B. C. Johnson, for General Counsel, Direct.

Q. Did you go to Appliance Park on August 4th? A. Yes, sir.

Q. Were you by yourself? A. Yes, sir.

Q. You knew what kind of work you were going to do? A. Yes, sir.

Q. What was the job? A. Rebricking, repairing furnaces.

Q. Furnaces. And you went there on August 4th? A. Yes, sir.

Q. What time of morning did you get there? [122] A. I got there around quarter past seven.

Q. To which gate did you go? A. 3-A.

Q. Why did you go to Gate 3-A? A. That's the gate I am assigned to.

Q. Were you in a car? A. Truck.

Q. Truck have a sticker, contractor's sticker? A. Yes, sir.

Q. What did you see there, and do, when you got there? A. I saw the men had cards.

Q. You mean signs, picket signs? A. Yes, sir, and approximately three or four other fellows. So, I parked alongside the road, got out of the truck, and I asked one of the fellows with one of the cards were construction men going in.

Q. Will you repeat that, please, I didn't hear it. A. I asked him was there any of the construction men going in, and he said not that he knew of. I said I wanted to know, I heard there was a strike on, I wanted to know if I could get in to go to work. He said we will not keep you from going in, you can go in if you want to. I said no, I rather not, I respect the picket line.

Q. You respect the picket line. What did they say to that? A. I just went off then, back to my truck.

[123] Q. Did you notice what the signs said that they were carrying? A. I paid no attention.

Q. You paid no attention to the signs. You say you saw pickets carrying signs and you respected the picket line. A. Yes, sir.

Q. Did it make any difference what the sign said? A. Well, I guess ordinarily it would, but as I had already heard they were on strike—

Q. Against whom? A. General Electric.

* * *

RICHARD J. LANG was called as a witness by counsel for the petitioner, and after having been duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Schurr) * * *

[124] Q. Do you work for Liberty Engineering and Manufacturing? A. Yes, I do.

Q. What is your occupation? A. Brick layer.

Q. Were you assigned to work at Appliance Park, like Mr. Johnson, on August 4th? A. Yes, I was.

Q. Did you go there by yourself, in your own car? A. By myself.

Q. On that day? A. August 4th.

Q. What time did you go? A. Seven a. m.

Q. Which gate did you go to? A. 3-A.

Q. Any reason why you chose that gate? A. That's the gate we are assigned to go to.

Q. That's the gate you were told you could enter. Did your car have a contractor's sticker on it? A. Yes, it did.

Q. Will you state what you saw and what was done, what you did when you got there? A. Arrived there, there was three pickets there. I respected [125] the picket line and left. They had their picket signs they was on strike against General Electric, so I left.

* * *

Q. You didn't work at all during the time of the picketing at Appliance Park? A. No, I didn't.

* * *

---

[126] JAMES S. NAPIER was called as a witness by counsel for the petitioner, and after having been duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Schurre) * * *

Q. And are you employed by Service Erection and Machine Company? A. Yes, sir.

Q. Is that one of the contractors who work at Appliance Park? A. Yes, sir.

Q. How long have you been working for Service Erection and Machine Company? A. Since January.

Q. Of this year? A. Yes, sir.

Q. What is the nature of your work? A. Millwright.

* * *

[127] Q. Were you assigned to do some work at Appliance Park by your company? A. Yes, sir.

Q. When had that work started? A. About a month before the strike.

Q. A month before the strike. How many members, or what was the size of the work force that Liberty had at the Plant? A. You mean service?

Q. I am sorry, I mean Service Erection Company had? A. I imagine we had about twenty or twenty-five.

Q. Twenty or twenty-five. Before the strike, how did you enter the plant? A. Gate 3-A.

Q. Does your car have a contractor's sticker? A. Yes, sir.

Q. Did you go to work on the morning of July 28th of this year? A. No, sir, we was working night work, second shift.

Q. Night work, oh, when did that shift begin? A. Four-thirty.

Q. Did you go there on July 28th about four-thirty? [128] A. Yes, sir.

Q. Will you state what happened when you got there? A. Well, I drove up to the gate, and there was pickets there, and I asked them if they was keeping out construction workers, and they said well, you have got to go down to the union hall and get a pass.

• • •

Q. Get a pass—from whom? A. Union hall—I said where is your union hall, they said on Poplar Level Road. I drove around and I finally found it, and I tried to get in, but it was so packed, I couldn't hardly move. So, I was late for work then, so I went back to the gate, and asked them if construction workers had went in, and they said no, and I said well, that is good enough for me, and I left.

• • •

Q. How long have you been employed by Wehr? A. About five and a half years.

* * *

Trial Examiner: All right, Mr. Segal, will you stipulate [156] this man is not a supervisor?

Mr. Segal: Yes.

Q. (By Mr. Rogers) Now, Mr. Terry, I would like to direct your attention to the period of time from July 28 to August 9, 1958, that's a period we have stipulated there was a strike at General Electric. Now, specifically directing your attention to that period, did you have occasion to go out to the premises of General Electric at any time? A. Yes, sir.

Q. When did you go out there? A. I went out there the morning that the strike was on.

Q. Where did you go? A. Gate 3.

Q. Gate 3? A. 3-A.

Q. 3-A? A. Yes.

Q. Now, when you got to Gate 3-A, what did you observe, if anything? A. Well, they had a picket line up there.

Q. Up where? A. At Gate 3-A.

Q. Can you tell us whether or not the pickets were carrying anything? A. Yes, sir.

Q. What were they carrying? [157] A. They were carrying a sign, a picket sign.

* * *

Trial Examiner: * * *

Mr. Segal has stated that all gates were picketed and that the signs used at one gate were like

[129] Q. And as far as you know, did the crew employed by Service Erection and Machine Company perform any work during the period there was picketing? A. No, there wasn't.

Q. You went back after the pickets were removed? A. Yes, sir.

Q. You know how much work there is to be done yet on that particular job? A. Well, we are finishing up now, shouldn't take over two [130] or three nights more.

* * * *

CROSS EXAMINATION:

Q. (By Mr. Sigal) * * *

Q. Do you know of your own knowledge who, if anybody from your company, did go to the plant? A. The only man that went in the plant to my knowledge is Mr. Wilson, he went in to get our records, so we could get paid.

* * *

JAMES F. WILSON was called as a witness by counsel for the petitioner, and after having been duly sworn, was examined and testified as follows:

[131] Direct Examination:

Q. (By Mr. Schurre) * * *

Q. Are you superintendent of the Service Erection and Machine Company? A. Yes, sir.

Q. How long have you been with that firm? A. Nine months.

Q. Prior to July 28, 1958, was your firm engaged in

those used at another gate. Mr. Segal has raised no question about the accuracy of the sign borne by the picket in General Counsel's Exhibit 2, so I should suppose that we might limit inquiries along this line to any contention of the General Counsel that additional legends were used. Certainly there is no dispute about what I have just said.

Mr. Rogers: That's right.

* * *

Q. Now, during the time that you have been employed by Wehr Constructors, Incorporated, have you had occasion to work at [158] General Electric previously? A. Yes, sir.

Q. By what—strike that. Have you received any instructions from anybody about the gate which you are to use to get into General Electric? A. Yes, sir.

Q. What are those instructions? A. Gate 3, 3-A.

Q. I am sorry. A. Gate 3-A is the one that we are supposed to go through, and come out.

Trial Examiner: Who gave you the instructions?

The Witness: My foreman.

Trial Examiner: Your foreman?

The Witness: Yes, sir.

Q. (By Mr. Rogers) Now, will you state whether you have ever been permitted to use any other gate? A. No, sir.

* * *

[160] RE-DIRECT EXAMINATION:

Q. (By Mr. Rogers) Mr. Terry, directing your attention to the period just before the strike at General Elec-

performing work under a contract with General Electric at Appliance Park? A. Yes, sir.

Q. Has your firm been doing work from time to time for General Electric? A. Yes, sir.

Q. For what period of time, how far back? A. Oh, two and half years.

Q. What kind of a job were you doing prior to the strike? A. Starting on some major changeovers.

Q. How big a work force did you have? A. Prior to the strike, we had approximately thirty people.

• • •

[132] Q. When did you first go to the job after the picketing started? A. I went Monday afternoon of the day the strike started, and I saw the pickets were there, and I made no effort to get in, and I went on over to the office, and they told me over there—

Q. Which office? A. Service Erection Company's office, and they told me none of the day crew had went to work at all and none of the second shift had went to work.

Q. Did you attempt to go to Appliance Park at all on the following day? A. Yes, sir.

Q. State what happened and why you went there? A. Well, Mr. Bleemel and myself,—

Q. Who is he? A. He is the owner of the company. He and I went to approach Gate 3-A and were stopped and were informed that we should go over to the union hall on Poplar Level Road and receive a pass.

Q. Had you told the pickets what you wanted to do? A. Told them we wanted to go in to get some paper work, and they said they would appreciate it if we would get permission [133] from the union.

Q. Whose car were you in? A. Mine.

Q. Yours. Your car have a contractor sticker? A. Yes, sir.

Q. What did you do after they told you to go to the union hall? A. I went over there and got a pass.

Q. Who issued the pass? A. Mr. Shake.

Q. You know his first name? A. Not positive, I think it is Charlie Shake, Charles.

Q. What did the pass say? A. Just admit bearer to premises, General Electric, and had his name on it.

Q. It was signed Shake, or Charlie Shake? A. I don't know whether it was abbreviated Charles Shake, or C. Shake, but he signed it.

Q. Did you go back there, tell us what happened? A. Go back where?

Q. To Appliance Park and get in? A. Yes.

Q. Did you show the pickets the pass? A. Yes.

Q. Then you got what you wanted, some records, was it, [134] paper records, were they? A. Yes, payroll and various types of paper work has to be maintained on a job of that size.

* * *

Q. Did you have occasion to go back there several times to get some records, while picketing was going on? A. Yes, sir.

Q. What happened? A. I just went over to the union hall first and got a pass and went on in.

Q. When you left, did you surrender the pass to the pickets? A. Yes, sir.

Q. Was it at their request? A. Yes, sir.

Q. Did you ever meet with any representative of this respondent during the period of the strike? A. Yes, sir.

Q. Now, who said that? A. Well, I wouldn't know, there were so many of them standing there, I wouldn't know.

Q. Where were you when this happened? A. We was in the car at this time.

Q. Where was the car? A. By the Gate 3-A here (indicating). And so they were lining us beside 3-A (indicating) so we pulled up. I was seated in the back, said "Can we go in?", they said "Go home." [166] So many of them we just kept driving; there was an officer standing in the street; he said, "Move on, move on," so we just kept going on.

Q. At the time the pickets told you to go home, where was Mr. Tupuritis, and where was Mr. Terry? A. They were seated in the car, too.

* * *

DIRECT EXAMINATION:

Q. (By Mr. Clay) * * *

[167] Q. And was the job that you were working on, work that had not been finished at the time the strike started? A. It just started, just started.

Q. You had just started to work? A. Yes, sir.

Q. When did you start? A. Started on a Wednesday, I think.

Q. The Wednesday before the strike? A. That's right.

* * *

Q. Will you state when and where that meeting was held? And who was present? A. Well, when I am not positive, I believe it was Wednesday [135] after the strike first started, July 30. Mr. Bleemel, the owner of the company, and Mr. T. A. Pitts, who is our business representative for the district counsel went over to the union hall to talk to somebody over there about admitting our people to go in and do the work.

Q. You were in the conference, were you not? A. Yes, sir.

Q. All right, what happened? A. Well, we sat down and discussed the situation and we were of the opinion that our contract was going to be cancelled if we didn't get in there to do the work. So, we discussed and talked for a little while.

Q. Who was there on behalf of the union? A. Mr. Bill Lessor, gentleman I talked to.

Q. Anybody else? A. Oh, there was some there, but I don't know who they were.

Q. State what the conversation was? A. Well, I couldn't tell you what all the conversation was, but I just got through telling you what it was about. And at the end of the conversation, we had not received any permission to enter the park.

Q. What did Mr. Leesor say when you made this request for permission to enter? A. Well, he just mostly—well, he said I know that you can appreciate that we have a picket line up over there.

[136] Q. That was about the size of the meeting? A. About the extent of it, yes.

Q. Did you again have any meetings with any representatives of the union? A. Yes.

CROSS EXAMINATION:

Q. (By Mr. Segal) • • •

[168] Q. You have gone in other gates, have you not? A. The first gate.

Q. Gate 3? A. Gate 3-A. The guard won't let you go through 3.

[169] Trial Examiner: Now, you just think for a minute and give us your best truthful recollection.

Do you recall ever seeing an employee of G. E. walking through Gate 3-A?

The Witness: I will tell you this way, if you go to 3-A, if you ain't got your button on, the guard is going to stop you. See, they have a guard there, and you are supposed [170] to have your button so he will know who you are, going through.

• • •

FURTHER CROSS EXAMINATION:

Q. (By Mr. Segal) • • •

Q. You don't know whether that was a badge or a card or what it was. A. I couldn't say it was a badge, because you could go through that way, if it wasn't a badge, because I tried to go through 3-A myself, I had a brother-in-law carry me out to G. E. and so we started through 3 and the guard stopped us and [171] said no, he can't go through 3, he has to go through 3-A, and that was my first time I started working for Wehr. So he turned us around to go through 3-A, so he pulled up and let me out and I went on through.

• • •

Q. Please tell us about those and when they were held? A. Well, when, I don't know exactly whether it was Thursday, the 31st—I will say it was the 31st.

Q. Was this meeting for the same purpose? A. Yes, sir.

Q. Who was present? A. Mr. Bleemel, Mr. T. A. Pitts, Mr. Oscar Coke.

Q. Who is Mr. Pitts? A. Business representative for the district council.

Q. That's your union? A. That's right.

Q. And Mr. Coke, have you identified him? A. He is Commissioner of Industrial Relations for the State of Kentucky.

Q. Who was there on behalf of the union—I mean the respondent? A. Mr. James, Mr. Fitzmorris was there, and a couple of others that I don't recall their names.

Q. You know who Mr. Fitzmorris is? A. Positively, no.

[137] Q. You know what position Mr. James holds in the union? A. I sure don't.

Q. What was said at that meeting? A. It was discussed about the same thing, the admittance of our people to go into General Electric's park and continue working on our project and it was practically the same discussion, just talking back and forth, and Mr. James said he had no authority to give us privileges to enter the park. However, that they were going to have an executive board meeting that night at four o'clock, and that was the time that General Electric and the 761 union were negotiating, and he was to call our business representative and inform him of what action was taken, and that evening he hadn't called, so I called Mr. James and he said that they hadn't got the

executive board meeting together, for the simple fact that the negotiations has lasted too long.

So, I called my business representative for the district council and he said he would talk to him the next morning, and so far as I know, I haven't heard any more about it.

Q. Mr. Brown told you, you said, the executive council was going to meet to decide the question as to whether they were going to permit you to go in the plant, is that what you said? A. Will you say that over again?

Q. You said that Mr. James, was it? A. Yes.

[138] Q. Said they were going to take up this matter? A. Said he would mention it to the executive board and he would discuss it with them.

Q. Did you hear from them during the strike as to what action the executive board took? A. No, sir.

Q. Did any of your crew or work force perform any work during the period of the picketing? A. No, sir.

Q. Did they go back to work after the pickets were removed? A. Yes.

Q. Are they still working there? A. Yes.

Q. How much work remains to be done? A. Well, it is very near completion.

* * *

CROSS EXAMINATION:

* * *

[139] Q. (By Mr. Sigal) * * *

Mr. Schurre: We will stipulate that he is a supervisor.

Q. Now, on these occasions when you went to the union office to talk to the people in the union office, you asked them

in effect to remove the picket line, insofar as your employees were concerned? A. No, sir, I asked them to grant us permission, give us special passes. I say I did, I mean we did as a body, special passes to cross their picket line.

Q. In the absence of passes, you didn't want to cross the picket line? Is that what you mean? A. That's right.

• • •

Mr. Schurre: Will respondent stipulate that Bob James [139-A] is first vice president of the respondent union?

Mr. Sigal: We will so stipulate.

Mr. Schurre: Will you also stipulate that Bill Leesor is recording secretary?

Mr. Sigal: Yes, we will so stipulate.

• • •

---

[140] The Witness: SYLVESTER D. COMSTOCK.

Direct Examination:

Q. (By Mr. Rogers) Mr. Comstock, will you tell us whether or not you are the same Mr. Comstock who testified previously in the 10(1) Injunction—in the injunction proceeding before the District Court of Kentucky for the Western District on last Thursday? A. I am.

Q. And at that time, I believe, you were employed by the R. J. Heffernan firm, is that correct? A. That's correct.

Q. Now, with regard to your testimony in that case, I believe you testified that on the morning of July 28, 1958 you had occasion to go out to Appliance Park to Gate Number 3-A. Now, will you state for the record in this pro-

ceeding [141] what occurred on that morning when you arrived at the premises of General Electric. A. On Monday morning, three of us went out there for work, and they were on a strike and they had pickets at Gate 3-A.

Q. Now, will you state for the record whether or not the pickets were carrying anything. A. Yes, they were carrying signs, part of them were.

Q. I will direct your attention to general counsel's Exhibit Number 2 and ask you to state whether or not the sign being carried by a man in that picture is similar to— A. Similar, yes.

Q. Similar to the sign that the pickets were carrying that morning. A. Yes.

Q. Now, you stated that you and two other persons went out there that morning. Who were the other two persons? A. Dennis Lee Schamore and Henry A. Fust.

Q. Who are they? A. One is my helper and the other one is a journeyman.

* * *

Q. In your truck. Now, when you arrived at Gate Number 3-A, approximately what time of day was it? A. I would say it was about ten minutes of eight.

Q. Now, on that occasion, will you tell us whether or not [142] you engaged in any conversation with anyone? A. I did.

Q. With whom did you engage in conversation? A. With a man there, that was standing there blocking it, that gate.

Q. And where were you and where was he when you had this conversation? A. I was then in the truck, and he was standing at my window of it, the truck.

contractor and you are not supposed to come through this gate." And I said, "Well, [178] that's what they told me down there," and they said, "Oh, the devil with that; you do like you are supposed to do." So I went back and asked the man, or asked some of them, if they knew where the pass was, and they said somebody had took it up. So I drove on down to 3-A and there they said, "Well, just go on in," that they took the pass up or something. And that was about the size of the conversation.

Trial Examiner: Mr. Segal, I would like for the record, please, the name of the man in the blue suit who sits at your table.

Mr. Segal: Bob James.

Trial Examiner: Now, does he have any connection with the respondent?

Mr. Segal: Yes, he is First Vice President.

• • •

[179] Q. Have you performed work out at Appliance Park in the past? A. For Garst-Receveur or other companies?

Q. For Garst-Receveur. A. Up until possibly two to three months before the strike, it was, from the time I went to work for them it was almost continuous up until that time.

Q. During that period of time, what gate did you use? A. 3-A.

• • •

Q. And where were Dennis Schamore and Henry Fust? A. They were sitting by me.

Q. All right, will you state for the record what conversation you had with the pickets out there?

• • •

A. So I asked them if they were going to let us in and work and they said no. So I asked them who was in charge and they told me no, and they told me no one. And so I asked them where their union office was and they told me over on Poplar Level Road. And I went over to their office. And—

Q. Now, was that the extent of the conversation? A. That was, there.

Q. Now, when you went over to Poplar Level Road, where did [143] you go? A. I parked along the roadside and I went in, and I went in the union office by myself. I asked the first person that I met who was in charge there, and they sent me to the rear of the building to the, I think the second office on the left, and I talked to some lady there. I pulled my union card out of my pocket and I showed it to her and I told her who I was and then as to what I wanted. And she said that I would have to wait. And then—and then, so I sat down there and maybe five minutes pass and some man come up. He asked me what—and he asked me what, he asked me what that I wanted. I told him that I would like to get a pass or a permit to get through that gate so I could pick up my own tools. And this man said "Sure." And then he wrote me out one, a pass, signed it, and then told me to give it to a certain person named and that if he wasn't there to give it to one of the men on the gate there.

DIRECT EXAMINATION:

Q. (By Mr. Clay) Were you assigned any identification, button or badge, in order to get into Appliance Park? A. Yes, sir.

Q. What did it consist of? A. On my car I have a white badge that says "Contractor's" and on my person I had a blue badge, Number 1317, I believe.

Q. You used those as means of identification to get into 3-A? [180] A. Yes, sir.

Mr. Clay: That's all.

The Witness: They check it each day.

* * *

[184] RE-CROSS EXAMINATION:

Q. (By Mr. Segal) One other thing, sir: You were hanging doors in Building 5, is that right? A. Yes, sir.

Q. And you left this last Friday, about which I questioned you a moment ago, approximately what time? A. Oh, let's see, now. Last Friday?

Q. When you were hanging the doors. A. I would say I left 10 to 15 minutes after four.

* * *

Q. All right.

What did you do then, if anything? A. I left the office, thanked him and left, and then I drove over there and I showed it to them and they opened up and I went in. And I picked up we three men's tools.

Q. When you returned to the premises of General Electric, were Schamore and Fust still with you? A. Yes, sir.

Q. And what gate did you go to, if any? [144] A. I went to Gate 3-A.

Q. And will you tell us whether or not that is the gate through which you went? A. Yes, sir.

Q. Following your being admitted to the premises of General Electric on that morning, what did you do, if anything? A. After I went in and got my tools, then, why we left there.

Q. By what route did you leave? A. By Gate 3-A.

Q. Now, will you state whether or not there were any pickets there when you left? A. There were.

Q. And will you tell us whether or not they were carrying any signs? A. Yes, sir.

Q. Now, directing your attention to the following day, July 29, will you tell us whether or not you had occasion to go to General Electric premises on that day? A. Yes, sir, yes I did.

Q. Now, when did you go there? A. I went there on the morning of the 29th at about nine or nine-thirty.

Q. And where did you go? A. I went to Gate 3-A.

Q. On that occasion, will you tell us whether or not there [145] were any pickets there? A. There was three there.

Q. Were they carrying anything? A. Yes, sir.

Q. What were they carrying? A. Picket signs.

Q. On that occasion, did you have any conversation with anyone? A. Yes, sir, I did.

Q. Was anyone with you? A. No, sir, I was alone.

Q. To whom did you talk? A. I talked to one of them on the gate and I asked him if I could get into the building one to our gang box and to pick up some of the boss' personal tools that I was going to work out at Eastern High School.

Q. What did the picket say? A. He said, "Well, why, you can't do it," and I told him that I had got in and got a pass from the union office on Monday morning and, and they hemmed and hawed and said, "Well, go on in, then."

• • •

[147] CROSS EXAMINATION:

Q. (By Mr. Segal) • • •

[148] Q. As a matter of fact, when you got a pass the first time, you didn't surrender it as you left? A. No, sir.

Q. You kept it with you, is that right? A. Well, after I left Appliance, I lost it, or, lost it or misplaced it, or I threw it away, one of the three.

Q. Mr. Comstock you supervised the other two men that worked with you, is that right? A. Yes, sir.

Q. So you were sort of a supervisor for that job? A. Yes, sir.

Q. And to what building did you go when you got your— A. Building one.

Q. That's a production building; I mean by that they make— A. That's right.

Q. What do they make in there? A. Washers and dryers.

• • •

[149] RE-DIRECT EXAMINATION:

Q. (By Mr. Rogers) Mr. Comstock, will you tell us whether or not the work which you were performing, or—yes, the work which you were performing at Appliance Park related to complicated electrical apparatus? A. Yes, yes it does.

* * *

[150] FURTHER RE-DIRECT:

Q. (By Mr. Clay) * * *

Q. And how long have you been at Appliance Park, off and on? A. Maybe five years, in and out, I was there.

Q. Were any instructions given to you and your men as to what gate to use? A. Yes, sir.

Q. What were those instructions? A. 3-A.

Q. Sir? A. 3-A.

[151] Q. Was anything issued to you to identify your truck? A. I was issued a white kind of tractor windshield pass, and I was also issued a blue personal pass; I have also been issued a red kind of, a red kind of tractor pass.

Q. That is called "supervisory." A. That is a roving pass, yes.

Q. Have you ever gone through or come from the Park using any gate other than 3-A? A. Only back when the building six was being built and we used to could use the Turner Struck Gate.

Q. Turner Struck was—what did they perform? A. They were general contractors in the building of building six.

Q. So you used only contractor gates? A. Only the

two gates, yes. And that gate had been closed since the early spring.

* * *

[153] Trial Examiner: How long had you been working at the G. E. Plant immediately before the strike began?

The Witness: Well, I would say maybe a year or two.

Trial Examiner: Every work day?

The Witness: Practically. Maybe one miss a day here and there is all.

Trial Examiner: What was the nature of the work in which the journeyman and your helper were engaged?

The Witness: They were helping me install and put cables, which is known as a Stromberg system, which is a new outfit that's something to do with the press workers and their punch cards, or something. And the main portion of it isn't to be shipped until the latter part of November of this year.

* * *

Mr. Rogers: MR. LONNIE TERRY.

* * *

[155] Direct Examination:

Q. (By Mr. Rogers) * * *

Q. Are you employed? A. Yes, sir.

Q. By whom? A. Wehr Constructors.

Q. In what position are you employed, what do you do? A. Laborer.

Q. That's not a true statement. As you have testified, the contractors don't have badges; is that right? A. Well, 100 percent of them do not have badges.

Q. Well, as a matter of fact, didn't you tell us that this policy has been abandoned? A. Well, I say it is obsolete; we haven't been able to make it work. However, we do have a large number of badges out. In other words, the older employees, a large number of them still [205] have their contractor badges.

Q. You mean you are not calling them in? A. It doesn't do any good.

* * *

[206] A. Yes, there were some contractor employees that came through Gate 3-A during the strike.

Q. Well, now, do you know how many? A. Oh, that would be kind of rough to—

Q. Do you know how many cars? A. I could give you a rough estimate. I would say approximately 15.

* * *

[207] A. I might mention that during the period in question we kept a register of all vehicles that came through Gate 3-A, in addition to our normal checks. This register was instituted for that reason, to prevent G. E. employees from coming in through Gate 3-A, as a double check.

Q. Well, you didn't register the individuals in cars, only the car, is that right? A. Anyone that came in Gate 3-A during the strike was registered on this particular register.

Q. Any individual? A. Yes, sir.

* * *

[208] Q. Well, do you agree with Mr. Means there were about 2,000 people working in there? A. Yes, sir, I would say approximately that.

Q. So, figuring four people per car, that would be what, approximately 500 cars? A. If you had four people to the car.

Q. Were these individuals checked as to whether or not they were contracting employees or regular employees? A. They weren't checked individually, no, sir.

• • •

[211] Q. So that the key bulletin, so far as you are concerned, and your instructions are concerned, is Bulletin Number 9; is that correct? A. As far as the written part of it, yes, sir.

Q. So these other bulletins are relatively unimportant. Number 9 is the source of all your authority, is that correct? A. Well, other than oral instructions that we receive from time to time on those.

Q. Now, this plant bulletin number 9 actually was issued on January 20, 1954.

Here it is, right here (handed). A. Yes.

Q. And, as outlined in what you might call a preamble, it is stated, "The purpose of this bulletin • • • In the event of labor difficulties with the various AF of L Craft locals this separate entrance gate for Direct Contractors' employees should also minimize the possibility of picketing our regular entrances, Gates #2, #3 and #5 used by GE employees. This latter gate was previously designated as Gate #4 in Plant Protection Bulletin #8 dated January 5, 1954." Is that correct? A. That's correct.

• • •

tric will you tell us whether or not you were working out at General Electric? A. Yes, sir.

Q. And what were you doing? A. Well, we was digging a ditch.

Q. For what purpose, do you know? A. No, sir, I don't know.

Q. Where were you digging the ditch? A. At Warehouse 10, I believe is what they call it. I think that's the number on it.

* * *

---

[163] LAWRENCE WALTON, a witness called by and on behalf of the General Counsel, having previously been sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Rogers) * * *

Q. Are you employed? A. Were, have been, laid off now.

Q. You were employed by Wehr Constructors. A. That's right.

Q. In what capacity are you employed? A. What do you do? A. Laborer.

[164] Q. How long have you been so employed? A. Beg your pardon?

Q. How long have you been employed there? A. Two and a half years, off and on.

Mr. Rogers: May it be stipulated that Mr. Walton is not a supervisor within the meaning of the Act?

Mr. Segal: (Nods.)

L. Walton, for General Counsel, Direct.

Q. Now directing your attention to the period of time that, in late July and early August of this year, when there was a strike at General Electric, did you have occasion at any time during that strike to go out to the Appliance Park premises? A. Yes, I did.

Q. When did you go out there? A. On Monday morning, it was.

Q. The first day of the strike? A. Yes, the first day.

Q. Now, when you got out there, where did you go? A. Well, we rode the bus out, and—

Q. Who is "we"? A. Lonnie Terry. And so we got off the bus and we waited on Mr. Arnold, that's the fellow seated over there.

Q. Mr. Tupuritis. A. Yes. So he came along, he picked us up, and so we reached Gate 3, and a bunch of them were standing there and so we, some of them hollered out and said, "Go home", so we just kept on going.

Q. What Gate did you go to, you say, 3-A? [165] A. 3-A, that's right.

Q. Now, what did you observe, if anything, at Gate 3-A? A. Well, we were going to work—

Q. What? A. I beg your pardon?

Q. What did you see, if anything, at Gate 3-A? A. Oh, they had pickets.

Q. Now, what were the pickets carrying? If anything? A. I think it was USIF something on strike.

* * *

Q. Now, on that occasion, did you have a conversation with any of the pickets? A. No, just asked if we could go in, and he said "Go home."

[215] Trial Examiner: What is the means of communication, if any, between Gate 3 and Gate 3-A?

The Witness: Gate 3 and Gate 3-A intersect at the gatehouse. If you come in Gate 3-A, approximately, oh, I would say 30 feet after turning off of Buechel Bank Road, you turn east. That road intersects with the roadway coming in from Buechel Bank Road past the gatehouse. In other words, you have an intersection there. Gate 3 roadway itself intersects Buechel Bank Road at a 90-degree angle running north and south. Gate 3-A passes the gatehouse going east and west.

• • •

[216] Trial Examiner: How are finished products removed from this plant?

The Witness: Finished products are removed by rail and by truck. If they go out by truck they exit at Gate 3 and Gate 4. Gate 3 has a truck pull-off, it is approximately 33 feet wide, it—

Trial Examiner: That's all right. They go out at 3 and 4 if they go by truck?

The Witness: Yes, sir.

Trial Examiner: Is one trucking concern, or two or three trucking concerns used exclusively, or are there a much larger number?

The Witness: A larger number, sir. I wouldn't venture a guess.

Trial Examiner: Are local retailers of the products made at this plant permitted to come to the plant and obtain the [217] desired quantity?

The Witness: No, sir, that isn't handled that way.

Trial Examiner: You ship it out to even local people by truck?

The Witness: Yes, sir.

• • •

FURTHER CROSS EXAMINATION:

Q. (By Mr. Segal) There is no obligation on any driver to carry the same passengers every day in his car? A. No, sir.

Q. You don't register the car? A. No.

Q. Now, in line with what the Trial Examiner was just asking, on the contractors' supplies coming in, let's say the contractor wants some supplies and needs some supplies, other than what he has himself, he wants to buy from another man; what gate do these people use? A. If the contractors' supplies—if it is contractors' supplies they come through Gate 3-A.

Q. How do you know this? A. We check the bill of lading. When they come in they have got their bills where they are going, who it is for. Otherwise they would never know where to go to let it off.

• • •

[218] RE-DIRECT EXAMINATION:

Q. (By Mr. Rogers) • • •

[219] Q. Now, it is my understanding that that gatehouse is referred to as gatehouse Number 3. A. That is correct.

Q. And it is at that point that traffic passing through Gate Number 3 and through Gate Number 3-A is checked; is that correct? [220] A. That is correct.

McDONALD WOODS, a witness called by and on behalf of the General Counsel, having been previously sworn, was examined and testified as follows:

* * *

Direct Examination:

Q. (By Mr. Rogers) What is your residence, Mr. Woods? A. 3419 Allison Way, Louisville.

Q. And are you employed? A. Yes, sir.

Q. By whom are you employed? A. Garst-Receveur Construction Company.

[172-173] Q. In what capacity are you employed? A. I am estimator, supervisor and I carry a millwright card.

* * *

Q. How long have you been employed by Garst-Receveur? A. Almost two and a half years.

* * *

[174] Mr. Rogers: I will stipulate he is a supervisor.

Mr. Segal: (Nods.)

Q. (By Mr. Rogers) Now, directing your attention to July 28, the date upon which the—the day following the commencement of the strike at General Electric, did you have occasion to go to the premises of General Electric? A. Not at that time.

Q. Did you have occasion to go to the premises of General Electric at any time during the strike? A. I did.

Q. More than once? A. Yes, sir, twice.

Q. When was the first time? A. I don't remember the exact date, but it was approximately the Monday following the strike, or the Monday before the strike was over.

* * *

J. Gatton, for General Counsel, Re-cross.
R. H. Weber, for General Counsel, Direct.

Q. Now, I note on the diagram near the gatehouse, at Gate Number 3, the common gatehouse for Gate 3 and 3-A. On the stretch of roadway that comprises Gate 3-A there is a widening in the roadway. A. That is correct.

Q. What is that for? A. That is used for a parking area to register those contractor persons—employees, in, or to turn around in and go back if the case may be that they don't belong there; because this is an 11-foot driveway down through here (indicating) and not wide enough to turn around on. Of course it could be turned around on, but it would be difficult.

• • •

[223] RE-CROSS EXAMINATION:

Q. (By Mr. Segal) • • •

Q. You are telling us, therefore, that all of the trucks come into 3 except the trucks using the direct contractors' trucks, [224] is that right? A. Well, we have trucks coming in Gate 4 also, but if it is construction material for the contractor it comes through Gate 3-A only.

• • •

---

[228] ROBERT H. WEBER a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Rogers) Mr. Weber, are you employed? A. Yes, I am.

M. Woods, for General Counsel, Direct.

[175] Q. Now, on the first occasion that you went out to General Electric, did you have occasion to have a conversation with any of the pickets? A. I did.

Q. Who else was present at the time you had this conversation? A. There was no one with me. There was just the people on the gate.

Q. And where was this? A. That was at Gate 3-A.

Q. What time of day was it? A. I would say it was maybe 9:30 or 10:00 o'clock.

Q. In the morning? A. In the morning.

* * * *

[177] Trial Examiner: Now, Mr. Woods, did you talk with the man who wore the picket sign or was it someone else?

* * * *

The Witness: The man with the picket sign said he would rather I would get a pass to go in, so I asked him where to get it and he said to go over on Poplar Level Road; anyway, to their union headquarters, so I went over there and I believe the man in the blue suit I talked to, I'm reasonably certain of that, I asked him if I could go in and look at some work and would like to cross their picket line, so he issued me a pass, and I went back to 3-A and they told me at 3-A, the pickets, now which ones I don't remember, but they said trucks were going in that gate, to go to 3. So I went up to 3, gave the man the pass, and went up to the guardhouse.

And when I got to the guardhouse, they looked at it and they said, "Now, you know you are a

Q. By whom are you employed? [229] A. The General Electric Company at Appliance Park.

Q. In what city? A. I beg your pardon.

Q. In what city? A. In Louisville.

Q. In what capacity are you employed? A. I am a buyer in the purchasing section of the relations and utilities operations.

Q. How long have you held that position? A. Approximately six years.

Q. And will you state briefly what your duties are in your capacity as buyer, purchasing section, relations and utilities? A. Briefly my duties are to purchase expense materials, services materials; award contracts and sell scrap.

Q. Now, when you speak of awarding contracts, to whom do you award contracts? A. To outside independent contractors.

Q. Now, with regard to awarding such contracts, will you state what the fact is with regard to whether or not you let contracts for the relations and utilities department only? A. We award contracts— We award all the contracts for the relations and utilities department, and we award some contracts for the other buildings, the manufacturing buildings, on request.

Q. Now, for what type of work or services do you let contracts to independent contractors? A. Is the question for what type?

[230] Q. Yes. A. We let contracts to general contractors—is that the type that you—

Q. Yes. A. Electric workers, sheet metal workers, etc.

Q. Now, directing your attention to July 28, 1958, can

you state whether or not the relations and utilities department had any contracts let with any independent contractors? A. Yes, we did.

Q. Did you have more than one such contract? A. We did. We had two contracts with the Garst-Receveur Construction Company which has been previously mentioned here, and we had one contract with Liberty Engineering for a sheet metal job.

Q. Now will you state for the record whether or not any work had been commenced pursuant to these contracts prior to July 28, 1958? A. Yes, sir, there was.

Q. When were these contracts let? A. Taking them one at a time, the first contract with Garst for building a mezzanine in Building 6, I believe was awarded about June 10.

Q. Of what year? A. Fifty-eight. And work commenced about the 26th of June, the same year. The second contract with Garst was for an [231] installation of a truck dock on the rear end of Building 5, that job was awarded around the 23rd of June of '58, work began the 29th, the same month.

The third contract to Liberty Engineering was awarded right at the first of July and work began about five or six days thereafter.

Q. As I understand your testimony, work had been commenced with regard to all of these contracts prior to June 28, 1958, is that correct? A. Not prior to June 28.

Q. July, I am sorry. A. Prior to July 28, yes.

Q. And will you state what the fact is with regard to whether or not any of these contracts had been completed by July 28, 1958? A. None of the three contracts I mentioned was completed at that time.

* * *

[238] RE-DIRECT EXAMINATION:

Q. (By Mr. Rogers) Mr. Weber, with regard to these three contracts, the installation of the mezzanine in Building 6, for example, was that or was that not to be done pursuant to any kind of specifications? A. It was.

Q. Now, from where did those specifications come? A. These specifications originated from our plant engineering department, which is a department in the relations and utilities department.

Q. Now with regard to the specifications, do those specifications and did the contract itself call for a lump sum bid? A. It did.

Q. For a complete job? A. That's right.

Q. Now, with regard to the amount of that contract, that was negotiated, will you tell us whether or not that amount was ever subsequently changed or modified. A. Now will you refresh me which particular job you are speaking of?

Q. The installation of the mezzanine at Building 6. A. I don't recall offhand, as I mentioned a minute ago we have changes on a good number of contracts that we start out with of that nature, that size. I believe it was in excess of $8,000 [239] and sometimes we do have extras, I don't recall if we did on that one.

Q. Now, will you tell us whether or not all of these contracts were let on the basis of a lump sum bid? A. They all were.

Q. Can you tell us whether or not they were all let for a completed job? A. Yes.

[185] JOHN GATTON, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * *

[186] Direct Examination:

Q. (By Mr. Rogers) * * *

Q. And at that time you testified with regard to your duties at General Electric, and testified that you were a lieutenant in the plant, a plant guard, is that correct? A. That's correct.

* * *

Q. I wonder if you would describe for the Trial Examiner, and display to the Trial Examiner the various badges used as [187] identification for entrance and exit of Appliance Park, and explain their function. A. Basically we have three particular kinds of classifications. One is permanent, one is semi-permanent, and the other is temporary. Now, our contractor personnel fall under what we consider as semi-permanent type pass. For the contractor supervisor we have an oval shaped plastic suction cup type sticker that goes on the windshield in front of the rear-view mirror, and its color is red with black printing on it.

For the hourly contractor help and personnel we have a white oval shaped plastic black suction cup type windshield sticker that goes on the windshield in front of the rear-view mirror.

The difference between the two—both are required to use Gate 3-A for ingress and egress, but the red type is permitted to rove between buildings. The white type is re-

stricted to the parking lot adjacent to the job where the man is working.

* * *

[188] Q. (By Mr. Rogers) You had a badge in your hand there, Mr. Gatton. Would you briefly explain that? A. This is the type contractor personnel pass or badge that we still have a large number out, however the system itself is—it was never practical, insofar as the men wearing them. It is similar to our employee badge system. It was difficult to enforce, however, we still have a large number of these out on the contractor personnel.

* * *

Q. Now, will you state for the record whether or not any type of badge other than the two which you have just described as being for the contractor personnel—the red oval badge and the white oval badge—will permit entrance to Gate Number 3-A? [189] A. They will not.

Q. And will you state for the record whether or not a vehicle which is supplied with one of the contractors' badges or stickers, either red or white, would be permitted entrance to any of the other gate entrances? A. It would not.

* * *

[194] Q. (By Mr. Rogers) Mr. Gatton, I hand you what has been marked for identification as General Counsel's Exhibit Number 4, and ask you whether or not the subject matter which is contained [195] therein has been implemented by the plant protection force? A. It has been, sir. Each guard has been briefed on this subject, and has a copy which is incorporated in a permanent-type manual.

* * *

[199] FURTHER DIRECT EXAMINATION:

Q. (By Mr. Rogers) Mr. Gatton, with regard to the control of ingress and egress to Appliance Park, what methods of identification are asked of or required of persons passing through any of the gates on foot? A. They have the—You are speaking of the contractor as well as the G. E. employee?

Q. That's right. A. The G. E. employee coming in on foot, if he is not recognized on sight by the guard, which happens quite frequently— I mean, they have been on the gates for so long they recognize the people that do come in on foot—they pass them on in—but if they should fail to recognize the individual as a G. E. employee he will be asked to show his G. E. identification card.

If a contractor employee should come in, we at the present time keep a card on file with his name, and what have you, the company he works for, at the gatehouse. If he should come in and say he works for that particular company, then that card is checked, and if he doesn't have one of our badges—and, like I say, the badge system has been difficult to enforce, we will be the first ones to admit it—

* * *

CROSS EXAMINATION:

[200] Q. (By Mr. Segal) * * *

[202] Q. So that if G. E. employees—if a G. E. employee comes through he could have contracting employees in the car, and contracting employees that go in this one gate you are telling us about, 3-A, he could conceivably have G. E. employees with him, isn't that true? A. Gate 3-A is the tightest gate we have got. We have got a man available

there that can check every car that comes through there, because we have a limited number that come through 3-A.

* * *

Q. What is the name of the guard that's on permanent duty, so to speak—the guards, I guess there are more than one at [203] different shifts—what are their names? A. We have got Willard Johnston on Gate 3; John Reed works Gate 3; Payne works Gate 3; Elmer Kissinger works Gate 3; and Ray Mutter works Gate 3.

Q. How about Gate 3-A? A. They are a terminus.

Q. I see. A. When they are at 3 they control Gates 3 and 3-A.

Q. After a car once gets into the Appliance Park, in other words, past the gate, they could park, or they could drive anywhere around the Appliance Park area, is that correct? There are no barriers between— A. No, there are no road blocks.

Q. That's right. So if a person got in Gate 3-A he could conceivably go over to the warehouse, if he wanted to? A. That's true.

Q. The warehouse parking lot. Or if he got in Gate 3 he could go over to where the contractors' employees work, if he wanted to? A. That's true.

Q. And by the same token if he went in 3-A he could conceivably let off individuals who might be working in Building 5, or 4, or 3, and then park; is that correct? A. You say he comes in 3-A—

Q. Or 3, or any gate. He could go by and let an individual off [204] at the plant, or at a point closest to the plant where he is working, and then go on and park, isn't that correct? A. Oh, that's true.

* * *

RE-CROSS EXAMINATION:

Q. (By Mr. Segal) • • •

[242] Q. Where is Central Maintenance? A. They are a department in the utilities and they are another department in our operation.

Q. Are you familiar with that operation of Central Maintenance? A. I don't know what you mean by familiar, I know where they are and who they are, yes.

Q. Do you know how they operate? A. Not completely, no.

Q. Well, do you know how many employees are part of Central Maintenance? A. I don't know for sure. I think there is around 100. That's my opinion. I don't know whether it's a fact.

Q. Yes. Now you do know, and you have seen bids from this department on jobs, is that right? A. Yes.

• • •

[244] Q. (By Mr. Segal) Now, some of these bids I assume were rejected by Central Maintenance? In other words, other contractors got the jobs? A. Yes.

Q. And I assume by the same token some of them were accepted and the independent contractors' bids were rejected. A. That's correct.

• • •

[246] Trial Examiner: • • •

Did Central Maintenance employees work for G. E. on a full-time basis?

The Witness: Yes, sir.

Trial Examiner: Well, if they are being paid on a full-time basis by G. E., why would G. E. want Central Maintenance [247] employees to bid on

a job, and I use the word, "bid," as distinguished from the word, "estimate".

The Witness: Well, I think to my knowledge, sir, the reason for that is that the various products departments at Appliance Park operate on an independent basis, each to make a profit, and I think it is their choice as to what they do, whether they go outside or inside. However, they go inside, by inside I mean Central Maintenance, whenever they possibly can.

Trial Examiner: I don't understand. Say it again.

The Witness: Let's take, for example, Building 1, we talked about, which manufactures home laundries. They are an entity all to themselves, so far as management is concerned and responsibility for making a profit. Now, if they have a job they will go to Central Maintenance for an estimate on it. They are not obligated to have Central Maintenance do their work, they could have someone on the outside do it. However, all efforts are made to funnel work down through Central Maintenance consistent with the labor force and so forth they have and with the type of job itself.

Trial Examiner: If Central Maintenance can do it cheaper, Building 1 might have Central Maintenance do it, is that right?

The Witness: That's correct.

Trial Examiner: If an outside contractor can do it cheaper, Building 1, or the management of Building 1, may get the outside contractor.

[248] The Witness: That's correct.

* * *

[250] FURTHER RE-DIRECT EXAMINATION:

Q. (By Mr. Rogers) Mr. Weber, now I show you a document consisting of several pages stapled together, [251] marked for identification as General Counsel Exhibit No. 8 and ask you to state what that is? A. These are general conditions dated January 10, 1958.

Q. And what is the nature of the general conditions? A. These nine pages of general conditions accompany our purchase orders—I will back up. They accompany—they are a part of the plant engineering specifications on jobs that we award and these, since our purchase order is tied into the plant engineering specifications, it in turn is tied into this, this is a part of our purchase order.

* * *

[252] RE-CROSS EXAMINATION:

Q. (By Mr. Segal) You are not telling me that this is a part of the contract [253] between the independent contractor and General Electric, are you? A. Yes.

Q. In other words, if they breach one of these provisions you could—in other words, if one of these provisions were not lived up to, so to speak, you could go into court on a breach of contract, is that what you are telling us? A. I assume we could.

Q. All right. Let me ask you, referring your attention to this No. 19 general that counsel asked you about, "entrance to property," reads, on page 6 reads, "Entrance to the site to be used by the contractor and his workmen shall be Gate 3-A or another entrance as may be designated by the owner." Is that correct? A. Yes.

* * *

[255] CECIL S. DENTON, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Rogers) You are employed by General Electric? A. Yes. Yes, sir.

Q. And how long have you been employed by General Electric? A. Three years, sir.

Q. And you are facilities planner and buyer of the sales and direction department? A. Yes, sir.

Q. How long have you held that job? A. I have been facilities planner for approximately a year and a half and buyer since January 1 of this year.

Q. Now, in your position as facilities planner and buyer are you responsible for getting bids and letting contracts to [256] independent contractors? A. Yes, sir.

Q. Now, on July 28, 1958, and prior to July 28, you had some contracts with Wehr Constructors, Incorporated—a contract with Wehr Constructors, Incorporated, and two with the Logan Company, is that right? A. Yes, sir.

Q. When was the contract with Wehr Constructors let? A. The one with Wehr Constructors was let on July 18, 1958.

Q. Now, is that the only contract which you had and which was being performed on July 28, 1958? A. Yes, sir.

* * *

Q. (By Mr. Rogers) That contract called for the erection of a foundation for an air raid shelter, did it? A. Sir, I would like to clarify a point. It is for, in the industry, what is known as an air shelter.

Q. An air shelter? A. Yes, sir.

Q. And where was this work to be performed? [257] A. On the north truck pad of the central warehouse. The foundation itself is approximately 300 feet north of the north end of the warehouse that you can see on the print.

Q. Now, that work had not been completed on July 28, had it? A. No, sir.

* * *

---

[259] WILBER GOODFLEISCH a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Rogers) Mr. Goodfleisch, you are employed by General Electric as manager of manufacturing engineering in the household refrigerator department, isn't that right? [260] A. That's right.

Q. How long have you held that position? A. Approximately four and a half years.

Q. Now in your duties in that position, a part of your responsibility is to obtain bids and let contracts to independent contractors, is that right? A. Right.

Q. Now, directing your attention to July 28, 1958, you had contracts let for the household refrigerator department with five different contractors, is that right? At least five? A. Yes. At least five.

Q. Five of those were Service Erection and Machine Company, Garst-Receveur Construction Company, Hatfield Electric Company, Link-Belt Company and Liberty Engineering and Manufacturing Company? A. Correct.

Q. Now, of those contracts, the contracts with Service Erection and Machine Company, Garst-Receveur Construction Company, and Hatfield Electric Company were in the course of performance, is that right? A. Right.

Q. Now, when was the Service Erection contract let? A. It was let early in July. I can give you the specific date if you care to have me look it up.

Q. Early in July of what year? A. 1958.

[261] Q. Can you give us the specific date on that?

Mr. Segal: If you have got it, you tell him, and I will agree with that.

Mr. Rogers: I don't have it.

Trial Examiner: Early in July is sufficient, I think.

Mr. Rogers: All right.

Q. (By Mr. Rogers) When was the Garst-Receveur contract let? A. About the same time.

Q. And when was the Hatfield Electric Company contract let? A. Early in July.

Q. Now, work commenced on the Service Erection contract about the second week in July, is that correct? A. That's correct.

Q. And the Garst-Receveur contract, the first week in July, is that right? A. Or earlier. Around in there.

Q. And the Hatfield Electric Company contract was commenced about three weeks before the strike? A. Correct.

Q. Now, the Service Erection Company contract was for a major conveyor rearrangement job, is that right? A. Right.

Q. The Garst-Receveur Construction Company job was for the construction of a truck dock, is that right? A.

That's right. Incidentally, the same truck dock that was previously testified to.

[262] Q. And the Hatfield Electric Company contract calls for the rearranging of house electrical equipment, is that right? A. Correct.

Q. Now, none of this work had been completed as of the date of the strike, is that right? A. That's right.

* * *

CROSS EXAMINATION by Mr. Segal:

Q. * * * Did Central Maintenance bid on all of these contracts? A. Not on all of them.

[263] Q. Did they bid on any of them? A. Yes.

* * *

[264] Q. Well, I was trying to develop if there were any other jobs upon which, or to which the Central Maintenance submitted a bid [265] during this same period that you told us about the Hatfield Electric Company and Garst-Receveur Company and the Service Erection. A. Yes, I think there were numerous minor jobs that they had submitted bids and also numerous jobs that they had been given orders to proceed on.

Q. And the same question, some of these bids were accepted and some were rejected? A. Yes.

* * *

[267] DAVID FALK a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Rogers) Mr. Falk, you are employed by General Electric as construction engineer, home laundry department, is that right? A. That's right.

Q. How long have you held that position? A. A little over a year.

Q. Now in that position are part of your duties relative to contracting for work required and letting bids to independent contractors and getting bids and letting contracts, is that right? A. That's right.

Q. Now, directing your attention to July 28, 1958, you had several contracts let at that time, isn't that right? A. That's correct.

Q. You had a contract with Henderson Electric Company, Inc., R. J. Heffernan Electrical Contractor, Garst-Receveur Construction Company, George E. Blanford, Inc., Raymond M. Meyer Plumbing and Heating Contractors, Inc., and John L. Zehnder Company, is that right? A. That's right.

[268] Q. Now, work had been commenced pursuant to the Heffernan contract only on July 28, is that right? A. That's right.

Q. When was that contract let? A. In January, 1958.

Q. And when did work commence pursuant to that contract? A. Also, in January, 1958.

Q. Now, that called for the performance of an electrical product control device? A. That's correct.

Q. Where was this work performed? A. In Building 1.

Q. Would that be the manufacturing floor of the home laundry department? A. That's right.

Mr. Rogers: That's all.

One question.

Q. (By Mr. Rogers) Have any of the employees of the contractors, who were doing the work you testified to, performed the work after July 28 when the strike commenced—or after July 27th? A. You mean during the strike period.

Q. During the strike. A. No work was performed during the strike period.

Q. By the contractor personnel? A. By the contractor personnel.

• • •

---

[273] **Stenographic Transcript of Testimony at Hearing of September 23, 1958.**

• • •

[275] PROCEEDINGS

• • •

[277] JOHN JOHNSON a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Segal) Mr. Johnson, are you an officer of the Respondent Union? A. Yes, I am. I am President of Local 761.

Q. Now, on or about July 27, the Respondent went on strike against General Electric, is that right? A. That's right.

Q. Now, what was the strike about? A. The strike was about 24 unsettled grievances that we had processed through the three steps of the grievance procedure under our contract.

Q. All right. When did the strike end? A. The strike ended on Sunday, August 10, around 9:00 o'clock, 9:00 p. m.

[278] Q. All right, sir. Now directing your attention back to the time when the strike began, when did picketing commence? A. The picketing commenced on Sunday, July 27, around 9:00 p. m.

Q. Please tell the Court what gates were picketed at the General Electric plant. A. We picketed all entrances to the General Electric Appliance Park, all gates.

Q. Do you know those gates by names or numbers? A. Yes, I think I can name them. Gate 2, Gate 3, Gate 3-A, and Gate 4 and Gate 5, and then there is a gate in the back that, as far as I know, has no number on Fagen Bush Lane that is actually closed, we picketed that, too.

Q. Now, were all the gates picketed in the same general manner? A. Yes, we picketed all gates of Appliance Park because we felt there were no difference in any of the gates because in our mind all G. E. employees were allowed to enter all gates.

Q. Now, were the signs the same, or relatively the same, with the same slogan on them or the same sign language on them, the picket signs? A. Yes, they were all practically the same.

Q. All right. I will show you General Counsel's Exhibit No. 2 and ask you to read that inscription off. A. Local 761 on strike, G. E. unfair.

[279] Q. Is that the Gate 3-A? A. That's Gate 3-A.

Q. Now, I think you have told us that all the gates were picketed at the inception of the strike in the same general manner, is that correct, sir? A. That's right, because we had no assurance from the General Electric Company that employees would not be allowed to enter any gate and we still have no assurance from G. E. that they cannot enter any gate of Appliance Park.

Q. Now, yes—Now, pursuant to the State Court restraining order and injunction, pickets were limited, is that right, sir? A. That's right, three at each gate.

Q. And that included 3-A? A. That included 3-A.

Q. And pursuant to that order, so to speak, the picketing continued at all gates with the three pickets, is that correct? A. That's right, it continued at all gates, yes.

Q. Now, the picketing at all the gates began at the inception of the strike and continued up until the time of the restraining order issued by the District Judge for Gate 3-A, is that correct? A. That's right.

Q. And what was the date of that, do you remember, Mr. Johnson? [280] A. I believe it was August 9 that the restraining order was put into effect that was on Saturday, I believe, around 11:00 o'clock, 11:00 a. m.

Q. And in compliance with that order, the pickets were removed? A. The pickets were removed from 3-A, yes.

* * *

Q. (By Mr. Segal) Why were all the gates picketed? A. The reason why the gates were picketed, for this rea-

son, we were on strike against the General Electric Company, we wanted the public to know that we were on strike against the General Electric Company and also to keep the employees of the General Electric out, for them to respect our picket line.

Q. Now, during the strike, was General Electric attempting to run its plant? A. Sure, they had big signs out that said this plant is open, come in, at the various gates. They sent out blue letters, as we call them, letters to their employees, to the community, explaining their side of the story and for everybody to come back to work.

Q. Had there been no contractors or contract employees on the job at G. E., would you have still picketed Gate 3-A? A. Yes, we would have still picketed 3-A for this reason, [281] as I said before we had no assurance from the General Electric Company that employees wouldn't enter this gate, we still have no assurance that they wouldn't be allowed to enter this gate during a strike or at any other time.

Q. Now, you are an employee of the General Electric Company, are you not, sir? A. I am, I am a machine operator at General Electric Company.

Q. Now, you have heard reference to the various bulletins that were allegedly passed out to these individuals named, L-1 through L-8. As an employee—I am referring to General Counsel Exhibits 4 and 5, and 6. I will show you these documents and ask you if you have ever had any knowledge of them as an employee. Look them over, if you haven't seen them. I think you probably looked them over before. A. I haven't. The only time I have seen these was yesterday. Or I seen one of them in the Federal Court last Thursday.

* * *

Q. (By Mr. Segal) I will ask you, sir, if you as an employee [282] knew of the information contained therein, in those bulletins? A. Not until I read some of them yesterday, and the one last Thursday.

Q. All right. Now you are also President of this Local Union? A. That's right.

Q. Now, as Union President, in contrast to your position as an employee, I will ask you the same questions as to knowledge of those bulletins. A. I had no knowledge of them until I seen them as I said yesterday and last Thursday, I seen the one.

Q. As far as the members of the Local are concerned, the members of the Local Union, the Respondent here, did they receive any knowledge, as far as you know? A. To the best of my knowledge, I would say no they didn't receive them.

Q. All right. Did the Union receive any copies of these bulletins? A. No, we did not.

* * *

[283] Q. (By Mr. Segal) * * *

Did the Company at the inception of the strike, or within a few hours after it began, or a day, notify the Union or any of its representatives as to the use to be made of Gate 3-A? A. No, they did not.

Q. All right. During the strike, while the strike lasted, did the Company at any time notify the Union as to the use of Gate 3-A? A. No, they did not.

Q. Now, has the Union, that's the Respondent, ever been given any assurance at any time that the production and maintenance workers who crossed and went into work,

would not use gate 3-A? A. By General Electric, you mean?

[284] Q. Yes. A. No, they have not, not by General Electric or anybody else.

* * *

Trial Examiner: * * * Will the General Counsel concede that during the course of the strike the Company attempted to [285] operate the plant and made a number of efforts to maintain operations?

Mr. Clay: Yes, sir, I think it could be said that the Company indicated that the plant was open, that anyone who had business to perform or work to do at the plant was welcome at the plant.

Trial Examiner: Including striking employees.

Mr. Clay: Including the strikers who wanted—any employee, not strikers, any employee of General Electric who wanted to come to work was free to do so.

Trial Examiner: Does that suit you, Mr. Segal?

* * *

Trial Examiner: What you want is a statement from the opposition to the effect that the Company tried to get all employees to work during the strike and otherwise to transact the plant's business during the strike, isn't that what you want, Mr. Segal?

Mr. Segal: That's correct, sir.

Trial Examiner: Isn't that what you, gentlemen, have offered him?

[286] Mr. Rogers: Yes, sir.

Mr. Clay: Yes, sir.

* * *

[287] Trial Examiner: In addition to that the preceding answer was stricken—in addition to the point made by Mr. Rogers, the preceding answer of the witness was stricken.

You may, if you wish, Mr. Segal, ask the witness if at any time during the course of the strike it was brought to his attention in any way that the Company was notifying employees, strikers and non-strikers, that they should not use Gate 3-A? Do you want to ask him that?

Mr. Segal: All right, sir. Would you repeat that question and make it mine, that the Trial Examiner—

Trial Examiner: You heard, Mr. Johnson?

The Witness: I had no knowledge of anybody receiving such notification.

* * *

[288] Q. (By Mr. Segal) Did the Union receive any—and the officers, [289] and yourself, receive any personal guaranties or assurances from the Company, or any of its spokesmen, that Gate 3-A would not be used by production and maintenance employees? A. I did not receive anything from the Company * * *

[291] Q. (By Mr. Segal) Was there a contractor or were there contractors at 3-A during the strike and the time of the picketing, to identify their personnel? A. A contractor?

Q. The independent contractors, were any of their personnel at Gate 3-A, or any representative for them, from their Company, [292] to identify the contracting employees?

* * *

A. Not to the best of my knowledge I know of no contractor who was there to identify the people—his people.

* * *

[293] Q. (By Mr. Segal) Now, on the first day of the strike did any production and maintenance employees gather around the gates? A. They gathered around all gates.

Q. Including 3-A? A. Including 3-A.

Q. Now, was the Union at any time offered an opportunity by the Company to personally check any contracting employees coming up to Gate 3-A, or any employees coming up to Gate 3-A? A. No, they were not.

* * *

[298] CROSS EXAMINATION:

Q. (By Mr. Rogers) Now, Mr. Johnson, you testified your position with the Union was what? A. President of Local 761.

Q. Now, did you participate in the calling of the strike on July 27, 1958? [299] A. The executive board, which I am chairman of, called the strike, plus after taking a strike vote of the membership.

* * *

[300] Trial Examiner: Now, the Respondent will concede, I believe, that the picket signs were carried by authorized agents.

Mr. Segal: I will, sir.

* * *

[306] Q. (By Mr. Rogers) Now, Mr. Johnson, you testified on direct examination that you felt there was, you and

the Union officers felt that there was no difference between any of the gates out at General Electric and for that reason you picketed them all. A. Like I said, the Union and myself felt like there was no difference between Gate 3-A and any other gate at Appliance Park because we had no assurance and we still have no assurance that G. E. employees would not be allowed to enter this gate.

Q. Are you familiar with Gate 3-A? A. I know where it is at.

Q. How long have you been employed with the Company? A. Almost six years.

Q. Now, what gate do you go in generally? A. I go through Gate 2 and Gate 5 most of the time when I go into the plant.

Q. I see. Now when you go into Gate 2, how do you approach [307] Gate 2? A. Well, I either come down Buechel Bank Road or I come off of the Progress Road, I believe they call it, and down that way. I come in various ways. I never come in the same.

Q. When you come down either Buechel Bank Road or the Progress Road, as you testified, that would bring you past Gate 3-A, would it not? A. Yes, that's right.

Q. So that over the course of the past few years, you have been past Gate 3-A many, many times, isn't that right? A. Oh, naturally.

Q. Now, I will show you a document which has been marked for identification as General Counsel's Exhibit No. 2 and I will direct your attention to a sign appearing therein at the right hand portion of the photograph reading, "Gate 3-A for employees of contractors only, G. E. employees use other gates."

You have seen that sign many times, haven't you, as you have driven by? A. I probably have. I don't remember whether I did or not. I am sure I couldn't have missed it if I have looked at it.

Q. As a matter of fact, you have seen that sign many times, isn't that a fact? A. I probably have. I don't remember reading it. I don't read every sign I pass.

* * *

[308] Q. * * * The reason for the picketing was to prevent G. E. employees from going into work? A. The reason for picketing was because we was on strike against the General Electric Company, and second we wanted the public to know that we were on strike against General Electric and what we was on strike for. Third, was to tell the employees that we were on strike and we hoped that they would respect our picket line and to keep them out.

Q. Now, you also hoped that the employees of the contractors would respect your picket line, isn't that right? A. Naturally. We hoped that everybody would respect our picket line.

Q. And it is my understanding that one of the things that you did during the course of the picketing, either you or other officers and officials of the Union, was to issue passes to permanent persons to go through the picket line, isn't that right? A. We did not deny anybody a pass to go through the picket line.

Q. You issued passes to go through the picket line? A. Sure, we issued passes if they came down and asked for them.

* * *

[309] Q. (By Mr. Rogers) Now, Mr. Johnson, isn't it a fact that one of your hopes with regard to your picketing was that everyone would respect your picket line and that all activity inside Appliance Park would cease? A. As I said a while ago, we hoped that everybody including even the management would respect our picket line.

Q. You hoped that all activity would cease inside the plant? A. We hoped that everybody would respect our pickets, yes.

* * *

Q. (By Mr. Rogers) Mr. Johnson, I hand you a document which has been marked for identification as General Counsel's Exhibit No. 10 and ask you to tell us what that is. A. That is picket instructions that we gave to the pickets that were on the gate.

Q. These were instructions that you gave to the pickets who [310] picketed during the strike in question. A. During the strike, yes.

* * *

Trial Examiner: I receive it.

Q. (By Mr. Rogers) Mr. Johnson, General Counsel Exhibit No. 10 was given to each of the pickets who went out on picket duty. A. It was. It was posted at the Union hall.

* * *

[311] Q. (By Mr. Clay) * * *

[312] Q. In regard to the General Counsel's Exhibit No. 10, the picket instructions, instruction No. 8 reads, I quote: "Discuss the issues that caused the present dispute with those that are misled into crossing the picket line."

Did you want your pickets to discuss anything with people crossing the picket line, other than this No. 8 instruction? A. It says here to discuss the issues that caused the present dispute with those that are misled into crossing the picket line. That means everybody, the pickets that are on the gate [313] when they are on duty or when they are off duty, discuss it with their neighbors, with their minister or with anybody else, or with people crossing the picket line, anybody, to tell them what our dispute is about, why we are out on strike, and why these people shouldn't go into work.

Q. Did that apply to contractors? A. I say that applied to everybody in the whole community, three Falls Cities or anyplace that you could get to talk to people.

Q. And by that you were hopeful of persuading contractors not to come in and their employees not to come in Gate 3-A? A. We hoped that everybody, as I said before, would respect our picket lines, yes.

Q. And you testified I believe, in your direct testimony that you had no knowledge of any discussions by the Company with the Union of the use of Gate 3-A for contractor personnel, is that right? A. That's right.

Q. How long have you been a Union official? A. Well, I have been a Union official since 1953 when we first organized this plant, if you want to call a shop steward an official. I was shop steward for about a year, I was chief—

Q. I mean a president or a vice president of the Union, the one who would have negotiated— A. Well, I was chief steward for three years which a chief [314] steward negotiates with the Company and I have been president for a year. About four years, altogether.

Q. Who would have discussed with the Company questions about Gate 3-A? A. The negotiating committee.

Q. And were you a member of the negotiating committee? A. I have been a member of the negotiating committee for four years.

* * *

[315] RE-DIRECT EXAMINATION:

Q. (By Mr. Segal) * * *

[316] Q. Now, is this the first strike that this local has even called at the General Electric Company? A. It is. It is the first strike that Local 761 of the I. U. E. has called a strike at Appliance Park.

Q. Now, to your knowledge, as your Union's president, have the employees of the General Electric Company, production and maintenance, ever been given any instructions not to enter any particular gate? A. To my knowledge, they have not.

* * *

Q. (By Mr. Segal) Are you familiar with the publication of the General Electric Company known as the "Daily Headliner?" A. I am.

Q. And also some documents which go out which are called "Blue Letters?" A. Yes, I am familiar with the Blue Letters, the Daily Headliner [317] letter.

Q. Do you know whether or not during this period or immediately before the strike, these documents contained any information as to all gates being open in the event of a strike? A. Yes, there were letters sent out and it was out in the "Daily Headliner" that the gates

would be open at Appliance Park and they made no reference to what gates you could come into.

* * *

RE-CROSS EXAMINATION:

* * *

[318] Q. (By Mr. Clay) One other question, Mr. Johnson. In the General Counsel's Exhibit No. 10, the picket instructions, instructions 1 and 2 emphasizes the importance of making a record of any trucking company, PUCO number from the cab of the outfit, to record license numbers of all trucks, cars and other conveyors— A. You are reading two of them, aren't you?

Q. Legibly and report to the Union Hall at the close of your shift. What was the purpose of doing that? A. You read two?

Trial Examiner: Yes, he's talking about paragraphs 1 and 2.

The Witness: One and two?

Q. (By Mr. Clay) Yes, I will read the first and second one: "The license numbers of all—"

Trial Examiner: You needn't read it, it is in evidence.

A. (Continued) The reason for that was because we wanted to talk to these people and explain our side of the story, which General Electric was able to do through their radio, television, advertisements, and talking to the people also. If we explained why we were out on strike and the 24 grievances we had, we was sure that these people would not cross our picket line.

[319] Q. Did you intend to urge that they not cross your picket line? A. We intended to explain to them—

Trial Examiner: You wanted to induce them not to cross again, isn't that right?

The Witness: We wanted to explain to them why we were out on strike and hoped that they wouldn't cross our picket line, yes.

Trial Examiner: The same thing.

• • •

RAY F. KOST, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Segal) Mr. Kost, you are an employee of the [320] General Electric Company? A. Yes, sir.

Q. How long, sir, have you been an employee? A. Approximately seven years.

Q. And in what department or section of the Company do you work at the plant? A. Central Maintenance.

Q. Is that the Central Maintenance that has been heretofore referred to, the Central Maintenance—the same Central Maintenance, the only one? A. Yes, sir.

Q. Now, have you ever gone through Gate 3-A at Appliance Park? A. I have gone through all gates.

Q. Have you been stopped when you went through Gate 3-A? A. No, sir.

Q. How recently have you gone through Gate 3-A? A. I would say, roughly, nine months.

• • •

Q. Now, do you have any special pass or sticker on

your car? A. Yes, sir, I have a sticker stating that I can go through Gates 2, 3, 4 and 5.

Q. And yet you have gone through, on occasions, Gate 3-A? A. Yes, sir.

• • •

[321] Q. (By Mr. Segal) As an employee of the General Electric Company, have you ever received any instructions as to going or not going through Gate 3-A? A. No, sir.

Q. Any meetings or assemblies of employees on Company time or otherwise, at which time the supervisor gave you any instructions as to 3-A? A. No, sir.

• • •

[326] Q. Have you ever done any work on these brick furnaces? A. Yes, sir.

• • •

[327] Q. (By Mr. Segal) What work have you done on the furnaces? Explain to us. A. Well, my buddy working with me, we would put in electrical connections and he would put the brick and mortar around them to seal them in, and lay the brick in columns in the furnace.

• • •

[328] CROSS EXAMINATION:

Q. (By Mr. Rogers) Now, Mr. Kost, you testified with regard to having gone through Gate 3-A. At the time you went through Gate 3-A, were you employed by General Electric? A. Yes, sir.

Q. And you were employed in Central Maintenance? A. Yes, sir.

Q. Now, you stated that you had been issued a sticker for your automobile which permitted you to go through Gates 2, 3, 4 and 5, is that right? A. Yes, sir.

R. F. Kost, for Respondent, Cross.

Q. Now on the occasions you went through the gate, in what manner did you go through Gate 3-A? A. The same manner in which I go through Gate 4 every morning.

* * *

[329] Q. Now, on that occasion when you went through, you testified you went through in your own automobile? A. Yes, sir.

Q. Now, when you went through in your own automobile, what kind of a sticker did you have displayed on your car, if any? A. I don't follow you there.

Q. Did you have your own sticker on display on the car? A. Yes, sir. It was a white sticker, at present. You see, they change stickers every so often.

Q. Now, was that at that time that you went through the gate last, was there a guard on duty? A. Yes, sir.

Q. Did the guard see you? A. Yes, sir.

Q. Did the guard make an effort to stop you? A. No, sir.

Q. Did he recognize you? A. Yes, sir.

Q. How do you know he recognized you? A. I know about two-thirds of the guards over a period of about seven years.

[330] Q. Who was the guard? A. I couldn't name the guard, sir.

* * *

A. They change the guards periodically. There is not a set guard at anytime, you know, specified time. They might have one guard on there today and one tomorrow. There is no particular guard assigned to that gate that I know of.

* * *

[331] Q. Now, how long have you been employed out at Central Maintenance? A. Approximately three years.

Q. And during that period of time you have had occasion to go by Gate 3-A regularly, I presume? A. No, sir.

Q. No, sir? A. No, sir.

Q. How many times have you been past gate 3-A in the three years, to the best of your judgment? A. Well, now, you can't specify that.

[332] Q. More than once? A. Oh, yes.

Q. More than ten times? A. Over a period of seven years which I have been crossing that gate, I would say—well, figure it up 7 times 365.

Trial Examiner: A little louder.

The Witness: Seven times three sixty-five, sir, and very few days I have missed.

Q. (By Mr. Rogers) Very few days you have missed going by Gate 3-A? A. Up until three years ago.

Q. All right. Since three years ago, how many times have you gone by Gate 3-A? A. One hundred, two hundred times.

Q. Now, I show you General Counsel's Exhibit No. 2. Do you recognize that as Gate 3-A, don't you? A. Yes, sir.

Q. Now, calling your attention to this sign over here, it says, "Gate 3-A, employees of contractors only. G. E. employees use other gates." You have seen that before, too, haven't you? A. Yes, sir, I saw it when it was being made.

Q. And that's been posted there how long? A. Oh, I would say roughly eight months, something like that, nine months. I haven't kept track of it.

Q. Eight or nine months, that particular sign? [333] A. I haven't seen the sign at this particular place, no, sir.

Q. Where did you see it? A. In Central Maintenance where it was made.

Q. It was made in Central Maintenance? Did you assist in making it? A. No, sir.

Q. You saw it made? A. I saw it leaning against the wall.

Trial Examiner: Have you been through Gate 3-A since that sign was put up several months ago?

The Witness: I don't believe so, sir.

Mr. Rogers: That's all.

• • •

[335] Q. (By Mr. Clay) • • •

Q. And you can see the sign at the entrance of Gate 3-A, is that correct? A. That's correct.

Q. As you approach it? A. Well, according to what you say, yes. But I have not seen the sign in its present location. It's been that long since I [336] have come through there.

Q. And why did you go through Gate 3-A nine months ago? A. To get into the Park, I would guess. You see I would have to have access to the Park. I don't remember just offhandedly why I went through there.

• • •

Q. How many times did you go through Gate 3-A prior to this incident that you mentioned? A. I would say four or five times.

Q. What was the occasion for your using the Gate that time? A. The same, to get into the Park.

Q. And you mean to say you feel that you can go through Gate 3-A or at—that you can go through Gate 3-A today or at any time during the past seven years that you have been there without being stopped by a guard? A. Well, no. The sign is up there now.

• • •

[337] Q. • • •

Is it your testimony that during the past seven years you could go through Gate 3-A at any time you wanted without being stopped by a guard? A. If the guard knows me, knows my car, I could go through that gate. yes, sir.

Q. You say if the guard knows you? What guard would that be? A. Approximately 50 per cent of them.

• • •

---

[338] FRANCIS J. SMITH, a witness called by and on behalf of Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Segal) Mr. Smith, how long have you been an employee of the General Electric Company? A. Nearly seven years.

Q. And what department are you currently working in? A. Building 4, maintenance.

Q. And how long have you worked in that capacity? A. Nearly four years.

Q. You do maintenance in that building only or in all buildings? A. In that building only.

• • •

[339] Q. Well, I will ask you, sir, whether or not you have ever received any instructions as to going or not going into Gate 3-A? A. I have not.

Q. Any written or oral instructions? A. I have not.

Q. I will ask you, sir, whether or not you have ever gone through Gate 3-A? A. I have.

Q. How recently? A. Somewhere around the 15th of July.

Q. Of 1958? A. 1958.

Q. Did you have any special stickers or anything on your car? A. I have two stickers on my car.

Q. What are they? A. One is for Gates 2 and 5, the other, sir, the other sticker is for Gates 2, 3, 4 and 5.

* * *

CROSS EXAMINATION:

Q. (By Mr. Rogers) Mr. Smith, where do you—do you generally drive to work each day? A. I am in a car pool, at the present time I am not with any regular riders, but there are usually five in the car pool, swap and take one day apiece.

[340] Q. And where do the other persons work who ride with you? A. At the time I am speaking of—

Q. At the present time, let's say. A. Buildings 4 and 5.

Q. Now, have you been in the same car pool for a considerable length of time? A. No.

Q. In what kind of a car pool were you on or about July 15, 1958? A. The kind, it was similar, different people.

Q. And where did those people work? A. Building 3, Building 1 warehouse, Building 4 and Building 5.

Q. Were they all G. E. employees? A. They were.

Q. Now, where did—where do you park your car? A. At the present I park in the main parking lot.

Q. In the main parking lot. That would be— A. Between Buildings 4 and 5.

Q. To the east of the manufacturing buildings? A. Yes.

Q. Now, you testified with regard to having gone through Gate No. 3-A. A. Yes.

Q. On or about July 15 of this year? [341] A. Yes.

Q. What time of day was it? A. Three thirty or three thirty-five.

Q. A. M. or P. M.? A. P. M.

Q. And what was the purpose of your going through Gate 3-A, why did you go through? A. We was leaving the Park, I had business at the Buechel Armory, it seemed to be the closest gate, I went through it, took care of my business, went back through it to get to Black Mud to go home.

Q. Black Mud Lane, what is Black Mud Lane? A. That's the extension of Poplar Level over to Fegenbush.

Q. Were you alone when you went through? A. No, sir.

Q. Who was with you? A. A boy by the name of Joseph Breeden, Building 5.

Q. Joseph Breeden? A. B-r-e-e-d-e-n.

Q. Just the two of you. Now, did you know the guard at Gate 3? A. I know him by nickname.

Q. What is his name? [342] A. They call him "Happy," is all.

Q. What? A. Happy.

Q. That was the guard who was on duty at the time

you went through? A. There were at that time, I believe, three guards at the gate.

Q. There were three guards at the gate? A. I believe so.

Q. Now, when you approached Gate 3A, there were—from where were you coming? A. I was coming—going out, sir.

• • •

Q. (By Mr. Rogers) I will show you a document which has been marked for identification as General Counsel's Exhibit 3 and I will ask you to show me, if you can, by which exit you left Appliance Park on the occasion you are talking about. [343] A. Well, I came, was picked up at Building 4, came across Center Street to Second over to the gatehouse, and over to 3-A and out.

• • •

Q. Now, you knew that you weren't supposed to go through that gate, didn't you? A. I did not.

Q. You didn't know that you weren't supposed to come back through that gate? A. I did not.

• • •

Q. I show you General Counsel's Exhibit No. 2 and point out to [344] you definitely, or specifically, the sign which appears thereon, "Gate 3-A for employees of contractors only. G. E. employees use other gates."

Now, is it your testimony that that sign was or was not there when you went through Gate 3-A on that occasion? A. I couldn't swear that it was or wasn't. I didn't look for it.

Q. You didn't see it? A. I didn't.

Q. Is that your testimony? A. It is my testimony.

Q. Now, how many times have you had occasion to go by Gate 3-A in the past three years? A. Very seldom.

Q. Very seldom. Once? Twice? Ten times? How many times? A. Maybe two or three times.

Q. Two or three times. And isn't it a fact that you have seen that sign or a sign similar to that sign posted there at Gate 3-A? A. I have never noticed it.

Q. Never noticed it?

Now, I will ask you the same question that I asked of the witness previously: As you come into Buechel Bank Road from the bypass, you would have a clear view of Gate No. 3-A, the opening to Gate No. 3-A, would you not? [345] A. Yes.

Q. There are no obstructions of any kind that would be in your way? A. No.

Q. So that there would be nothing to prevent your observing any signs or anything of that nature that were in the position where that sign appears to be on General Counsel's Exhibit No. 2, isn't that right? A. That's right.

• • •

---

[347] THOMAS C. FERGUSON, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Segal) You are an employee of the General Electric Company? A. I am.

• • •

[348] Q. I will ask you if you have on any occasions observed Mr. Woods going in or out of Appliance Park? A. Yes, sir.

Q Would you please tell the Board what you observed as to which Gate Mr. Woods went in or—out of, or however you saw it? Just tell us what you saw. A. Last Friday at lunch time we were outside where Mr. Woods was hanging doors on Building 5 and I guess it was his lunch time, because he had locked up his tools and got in his truck and left out by the guard shack that goes up by Gate 5.

Q. Did he go out Gate 5? A. He went out the road to Gate 5.

• • •

[351] Q. I see. Now, what time of the day was it? A. It was between 11:30 and 12:00.

• • •

---

[352] RUDOLPH MILBY a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Segal) Are you an employee of the General Electric Company? A. Yes, sir.

Q. And how long have you been, sir? A. Approximately four years.

Q. Have you ever gone through Gate marked 3-A? [353] A. I have.

Q. Are you an—You are an employee of General Electric, you are not working for any independent contractor? A. No, sir.

• • •

CROSS EXAMINATION:

Q. (By Mr. Rogers) When did you go through Gate No. 3-A? A. The last time I went through Gate 3-A was in January of '58.

Q. 1958? A. Yes, sir.

• • •

Q. Now, during the past nine months since January, have you had occasion to go by Gate 3-A at any time? A. Yes, sir.

[354] Q. More than once? A. I went by there numbers of times.

Q. I call your attention to General Counsel's Exhibit No. 2 and ask you if it isn't a fact that the sign which appears thereon, referring to Gate No. 3-A, "For employees of contractors only and G. E. employees use other gates." I will ask you if it isn't a fact that you have seen that sign in that location? A. I will set right here today and swear that that sign isn't out there right now, after I have heard all these other witnesses swear it is, because I have never to this date ever seen the sign.

Q. You have never seen the sign? A. That's right.

• • •

[355] Trial Examiner: Wait just a moment. I want the witness to tell us the circumstances under which he went through Gate 3-A in January of this year.

The Witness: Well, up until that period, see, I am the chief steward and a member of the executive board for Local 761, and up to—up until that period I was representing both Building 10, the warehouse, and Building 4, and I went in there on occasions almost every day, and sometimes as many as two or

three times a day, because I went backwards and forth into those two buildings and I had to come outside of the Park to get over—in a sense, I mean I had to come outside of the main parking lot in order to get into Building 10, and so on occasions I have used that gate. I would say several times.

Trial Examiner: Now, were you on your way to Building 10 upon the occasions in January of this year when you went through Gate 3-A?

The Witness: Yes, sir.

Trial Examiner: And what was your business in Building 10?

The Witness: As a grievance representative to counsel and advise the stewards in that building.

[356] Trial Examiner: You were having a Union meeting or a meeting with the Company?

The Witness: It would be on the occasions of meeting with the Company on a grievance or going to visit the stewards, counseling and advising and picking up grievances from the lower level to process into the second step. That would be the normal occasions for me going into Building 10.

I do not go in there any longer because, with a different arrangement with the management and the Union they have a representative for Building 10 alone.

Trial Examiner: What time of the day was it in January of this year when you went through 3-A?

A. I would—It was early in the morning.

* * *

[357] Q. Or had you been to Appliance Park previously that day? A. I had been to Appliance Park and went to

the Union office to pick up some material that I wanted to take along with me that day.

Q. Now, where is the Union office located? [358] A. Poplar Level Road, 5153.

Q. Now, is it your testimony that it was more convenient for you to use Gate 3-A than any other gate on that occasion? A. Oh, yes, sir, it was just—excuse me. I came out to the intersection there on Progress Road and turned down Progress Road and was approaching Appliance Park, that being the first entrance off there, I did that several times.

Q. Well, now, isn't it a fact that if you were coming from the Union office on Poplar Level Road the most convenient and the most direct entrance for you to use would be Gate No. 4? A. Gate No. 4 would have been the closest gate, but I never used Gate 4 but twice.

Q. As a matter of fact in order to use Gate No. 3-A, wouldn't you have to travel a substantial distance further to get to Building No. 10 than you would by going through Gate No. 4? A. See, the reason that I go, came to that entrance—

Q. Answer the question, please. A. That's what I am going to try to do.

Trial Examiner: The question is simply whether it isn't a substantial distance farther?

The Witness: It is a substantial distance farther, yes, sir.

Trial Examiner: That's all he asked you.

• • •

[359] Q. (By Mr. Clay) Mr. Milby, what type of sticker is issued to you? A. The sticker issued to me was only

to get into the two main entrances into building coming through, down there, Building 6 and Building 1, the only two my sticker would be permitted.

Q. Where are the two entrances you mean by that? A. Sir?

Q. What are the two entrances you referred to? A. Well, the Building 1 entrance, the big one and what is the number of it, and the one that comes into Building 5, the two main entrances into the Park. I noticed everybody mentioned them by numbers but I never referred to them in that order.

Q. Well, the gate that you come in to get to Building No. 1, is that the main gate that you are referring to, or Gate 3?

• • •

[360] Trial Examiner: The witness indicates entrances to Gates 2 and 5.

The Witness: That's what my sticker would permit me to enter at.

• • •

[361] A. Sometimes I go as much as twice a day.

Q. What gates do you use when you are going to and returning from Union Hall? A. I usually use Gate 5.

Q. Gate 5? A. Yes.

Q. Why is that? A. Well, because working out of Building 4 now, I am referring to now as I operate now, that is the most convenient way for me to go.

And my sticker permits me to go in and out of that gate.

Q. Do you mean to testify that you have no information whatever that you are not to use Gate 3-A? [362] A. I definitely intend to state that for the record.

Q. And you have never seen the sign at the entrance to Gate 3-A, in four years? A. I will—I have never. I will state this: I have never seen the sign to the extent that I read it. I don't say that I haven't noticed a bulletin being up here, but I would certainly sit here today and state that I haven't seen that sign instructing—the nature of the sign being to instruct employees not to enter that gate.

Q. And your sticker says that you are to use Gates 2 and 5, is that correct? A. Yes, sir.

Q. You do know the kind of sticker, you concede that? A. Yes, sir.

* * *

RE DIRECT EXAMINATION:

Q. (By Mr. Segal) Mr. Milby, just one question by way of clarification, in response to one of the General Counsel's questions as to the use of Gate 3-A rather than one of the other gates. A. Yes.

* * *

[363] Q. Actually, sir, my question was why you used the Gate 3-A on this occasion rather than Gate 4, that's the question I was referring to, or any other gate. A. Now, I understand it. The reason I didn't use Gate 4 was because I was instructed by management, Dick Alberstadt, not to use Gate 4. And the only time that I ever used Gate 4 was on two occasions and both of those occasions I was in Mr. Alberstadt's office and one of his assistants was Bill Lynch, or Bob Lynch, who called and told me to come through to—cleared me to come through and go over and go through that gate because he knew I had to go to the Union office to pick up an assistant chief steward who operated in that building by the name of Humphries and

he cleared us to come back through that gate because it would be to our convenience, and he called the guard in advance and we were cleared—those gates. The [364] Company's records will bear out—

Q. That's Gate 4 you are talking about? A. Yes, sir.

• • •

RE-CROSS EXAMINATION:

Q. (By Mr. Rogers) Now, Mr. Milby, do I understand your testimony then that Mr. Alberstadt felt constrained to call ahead to the gate to obtain clearance for you to get out of Gate No. 4? A. Not Mr. Alberstadt. I stated Mr. Lynch.

Q. Mr. Lynch? A. Yes.

Q. Who is Mr. Lynch? A. Mr. Lynch at that time was Alberstadt's assistant, I would say, I mean I don't know what his title was, they never gave us that information. He worked in labor relations alongside where Mr. Alberstadt—along with Mr. Alberstadt. He met with me on various occasions on grievances at the second level and in the department.

Q. All right. Now, on those occasions when a clearance was obtained for you to use Gate 4, when you got to Gate 4, did the guards check you and— A. Yes, sir. I stopped. At all times when I go into the plant I stop and registered into the building and that's the reason I made the statement a few minutes ago that their records [365] would bear out any time I went into Building 10.

Q. Through Gate 4? A. Through Gate 4 and Gate 3-A, or any other gate that I went into the plant other than 2 and 5 would be the only time that I didn't register.

Q. It is your testimony then, as I understand it, that

you registered in on each occasion when you went through Gate 3-A? A. Yes, sir.

Q. And when you left by Gate 3-A? A. Yes, sir. Not —when I left I didn't register out, I would only leave my pass.

• • •

Trial Examiner: Look, Mr. Milby, when you enter the premises of G. E., you don't register in at a gate do you?

The Witness: Not on—I don't register in at Gate 2 or Gate 5.

Trial Examiner: Do you mean that you have to register when you pass any other gate?

The Witness: When I was, when I was chief steward I stopped and left my name and clock number at the guard house when I went into Building 10, at any gate I went in.

[366] Trial Examiner: But you stopped and left your name and clock number at the building not at the gate, isn't that right?

The Witness: No, sir, I left my clock number at the gate.

Trial Examiner: Did you—

The Witness: The guard.

Trial Examiner: Did you give it to the guard orally or did you write?

The Witness: I always got out of my automobile and pulled up to the guard house, get out of my automobile, go in and write my name and clock number on a pad.

Trial Examiner: In January of 1958, at Gate

3-A, did you write your name and clock number on a pad?

The Witness: Yes, sir. At any time I went through that gate I wrote my clock number on the pad.

Q. (By Mr. Rogers) Mr. Milby, once you have written your name and clock number on this pad, you were given a pass, is that my understanding of your testimony? A. Yes, sir.

Q. And when you came back through that gate you dropped off your pass? A. Yes, sir.

Q. What kind of pass was it? A. It was a little old diamond-shaped sticker, it was yellow, I believe, part of it was yellow, and then they also picked up a little button, and both of them had numbers on it that [367] coincided with one another.

* * *

[369] Trial Examiner: And ordinarily there is no guard at Gate 3-A?

Mr. Clay: There is no guard at the—

Trial Examiner: In fact, there is no gate at that point?

Mr. Clay: That is correct. At the intersection of the roadway leading from the plant and bisecting Buechel Bank Road and known as Gate 3-A, we do not have a guard stationed at that particular entrance, except in times—as I think Mr. Gatton testified—of emergency, such as a strike.

Trial Examiner: Now, the guard who has something to do with people entering through Gate 3-A would actually be stationed at the southern end of the—

Mr. Clay: Gate 3.

Trial Examiner: Well, what do they call it, the guardhouse?

[370] Mr. Clay: The guardhouse.

Trial Examiner: The guardhouse of Gate 3?

Mr. Clay: Yes.

• • •

JOHN GATTON re-called as a witness by and on behalf of the General Counsel, in rebuttal, having been previously duly sworn, was further examined and testified as follows:

• • •

Direct Examination:

Q. (By Mr. Rogers) • • •

[371] Q. Now, in the course of the testimony given by Mr. Smith he referred to an occasion when a guard known as "Happy" permitted him to gain entrance to Appliance Park through Gate Number 3-A. Do you recall that testimony? A. Yes, sir.

Q. Will you state what the fact is, for the record, with regard to whether or not any of the guards employed by General Electric, under your supervision, are known by the nickname of "Happy"? A. I know of no guard known by the name of "Happy."

• • •

[372] Trial Examiner: Mr. Gatton, has it ever come to your attention that a guard permitted a G. E. employee to enter through Gate 3-A?

The Witness: No, sir, it has not.

Trial Examiner: Do you have a rule with respect to disciplinary action toward a guard who permitted an employee to enter through that gate?

A. Yes, sir, he—

* * *

Trial Examiner: Is it a rule which has been discussed in meetings of supervision with guards?

The Witness: Yes, sir.

Trial Examiner: When was the last time there was such a discussion?

The Witness: Shortly before the strike, the last—

Trial Examiner: Was the discussion in connection with the [373] forthcoming strike?

The Witness: Well, it was due to the general labor unrest at that particular time.

Trial Examiner: I will overrule the objection. What is the rule?

The Witness: The rule is if a guard doesn't carry out his assigned duties on that gate—and one of the assigned duties is to prevent G. E. employees from using Gate 3-A,—disciplinary action would be taken. The disciplinary action would, if it was a first time, would be a written contact.

* * *

Trial Examiner: A written contact? You mean a written reprimand?

The Witness: Yes, sir. That goes with his record.

Q. (By Mr. Rogers) Mr. Gatton, now will you state for the record whether or not there is a definite disciplinary

system with regard to the guards at Appliance Park?' A. Well, yes, sir, there is a regular disciplinary system.

Trial Examiner: What is that system?

The Witness: If it is a minor infraction, in our particular people's case, failing to carry out their rules and regulations, the first time they are given the benefit of the doubt, they receive what we refer to as a contact. If they persist they receive what is known as a warning notice, and if that continues [374] it subjects that individual to dismissal.

Q. (By Mr. Rogers) Now, Mr. Gatton, will you state for the record whether or not in the performance of the normal duties the guards under your supervision are to make a report to you of any unusual incident occurring at any of the gates? A. Yes, sir, any unusual incident is reported.

Q. And will you tell us whether or not an attempt by a General Electric employee to go through Gate Number 3-A would be the subject of any such report? A. Yes, sir, it would.

Q. And will you state again, for the record, whether or not in the course of your employment, and the performance of your duties, you have ever received such a report? A. No, I have never received such a report. Most of our people, when they are stopped and they receive an explanation of the rule, they voluntarily turn around and leave, consequently we don't feel that employee should be penalized through his own ignorance. No written notice is made on that unless he insists on going through, then it is. But we have never received one.

Q. Now, I would like to have you state again for the record whether or not the guards have been, in the past,

and prior to July 28, 1958, advised of their duties with regard to Gate Number 3-A? A. Yes, sir, they have, on numerous occasions.

[375] Q. And will you state again for the record what they are instructed to do with regard to gate 3-A? A. They are instructed to permit contractor employees only to use Gate 3-A.

Q. What, if anything, is their instruction with regard to checking persons going through Gate 3-A? A. They have been instructed to check those individuals, however, if they recognize them on sight, and know that it is a *bona fide* contractor employee, that's good enough.

Q. Now, Mr. Gatton, did you hear the testimony of Mr. Milby this morning? A. Yes, sir.

Q. Did you hear him testify with regard to stopping at Gate Number 3-A and registering and being issued a pass to go through Gate 3-A? A. Yes, sir.

Q. Now, will you state what the fact is with regard to whether or not there is any such system of registration provided for as testified to by Mr. Milby? A. There is no registration system set up at Gate 3 for G. E. employees entering Gate 3-A.

Trial Examiner: Is there any registration system at Gate 3, at the guardhouse, for G. E. employees who enter Gate 3?

The Witness: Yes, sir.

Trial Examiner: Well, if an employee of G. E. entered [376] Gate 3-A, or Gate 3, either one, there would only be one point of registration?

The Witness: That's correct.

Trial Examiner: At the guardhouse of Gate 3, isn't that right?

The Witness: That's correct, sir.

Q. (By Mr. Rogers) Mr. Gatton, will you state for the record whether or not you have ever had any report from any of the guards under your supervision with regard to the use of Gate 3 by any Union stewards? A. Yes, sir, there was an occasion that came up.

Q. Will you tell us about it? A. I would say nine months to a year ago, where the Chief Steward and the Assistant Chief Steward were cleared to go from Building 4 to the warehouse to handle Union business in that area, and they were permitted to use Gate 3; and they were also permitted to use Gate 4.

* * *

[380] CROSS EXAMINATION:

* * *

[382] Q. (By Mr. Segal) Now, you told us that you do not personally know of any guard by the name of Happy, is that right? A. No, sir, I do not.

Q. What about a nickname? A. By nickname, either.

Q. You are not telling us that there are not any guards who are called by men "Happy", or nickname "Happy"? A. To my knowledge I don't know a guard called that.

Trial Examiner: You mean insofar as you know?

The Witness: So far as I know, to my knowledge, no, sir.

Q. (By Mr. Segal) So it is obviously possible, isn't it, that some of the guards are known as "Happy," or one guard may be known as "Happy"? A. Yes, sir, that would be possible.

* * *

Discussion.

[385] Trial Examiner: There have been rulings on all other exhibits except General Counsel's 4, 6 and 9.

I have no problem now about General Counsel's Exhibit 4 as being admissible for the purpose of establishing a particular rule or rules, although the record is clear that the document itself was not circulated among the production and maintenance employees. • • •

[387] Mr. Rogers: From a check of the testimony of other witnesses in that transcript, it is developed that the Exhibit Number 2 referred to by Mr. Gatton in the Federal District Court case is the same document as General Counsel's Exhibit Number 5 in this proceeding, and Exhibit Number 1 referred to by Mr. Gatton in the Federal District Court proceeding is General Counsel's Exhibit Number 2 in this proceeding.

• • •

399 Trial Examiner: All right.

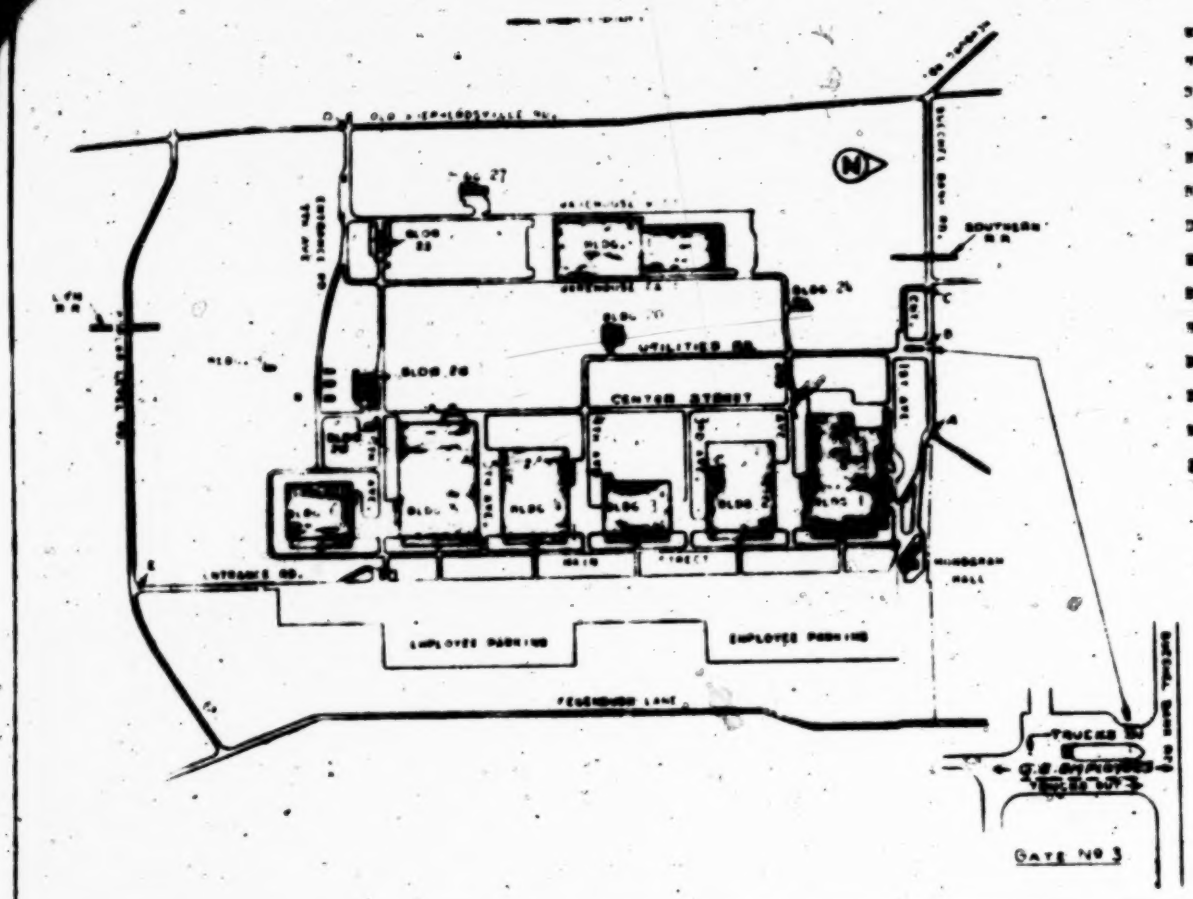
I want to ask the question of Mr. Rogers and Mr. Clay:

We have testimony here that finished products are removed by truck through Gate 3, and we have now an agreement of counsel that raw material is brought in by truck through Gate 3.

Mr. Clay: And 4.

• • •

General Counsel's Exhibit 2



LEGEND

Bldg. # 1 - Home Laundry
Bldg. # 2 - Range
Bldg. # 3 - Dishwasher, Disposall
Bldg. # 4 - Household Refrigeration
Bldg. # 5 - Household Refrigeration
Bldg. # 6 - Room Air Conditioner
Bldg. # 10 - Warehouse
Bldg. # 20 - Boiler House
Bldg. # 24 - Industrial waste Treatment Plant (I.W.T.)
Bldg. # 26 - Maintenance Bldg.
Bldg. # 27 - Salvage Bldg. & Incinerator
Bldg. # 29 - Plant Protection Bldg.
Bldg. # 56 - Nursery Bldg.
Bldg # 23 - Mill Water Pump House

A - Gate No 2 : Employees & Visitors
B - Gate No 3 : See Detail
C - Gate No 3A : Contractors Only
D - Gate No 4 : Trucks & Employees
E - Gate No 5 : Employees

GENERAL ELECTRIC CO.
APPLIANCE PARK PLANT ENGINEERING
PLOT PLAN C BURNFIELD
B-65942-4134-A

General Counsel's Exhibit 4.

May 29, 1957

Distribution L-1 through L-8
Messrs. RC Alberstadt
BB Ballance
WM Duffy
CF Eckert
AA Jackowicz
LC Welsh

SUBJECT: Appliance Park Windshield Sticker Identification System—1957.

This is to advise that our existing windshield sticker identification system for Appliance Park vehicles has been revised to meet 1957 requirements.

The revision conforms absolutely with prerequisites of all articles contained in Plant Protection Bulletin #17, which was issued after consultation and agreement with the General Managers, in 1956.

Stickers are issued on a time and frequency basis of:

Permanency ..... Class 1
Semi-permanency ..... Class 2
Temporary & Restricted Trip ..... Class 3

and * * * certain "types" of roving and parking privileges, relating to each classification of the stickers, are necessary.

Attached herewith, are three pages describing each sticker classification and subsequent sticker "type", in detail * * * for your information and guidance.

Issuance of the new stickers will begin June 24th, with distribution being handled in the manner described for each type. Issuance period shall expire July 15th, at which time

the existing windshield sticker identification system will become obsolete to be replaced *in toto,* by the new.

If you have any questions, call D. L. Powell, Chief-Plant Protection, EXtension: 2110.

H. J. BENZIE,
Manager,
Plant Protection & Communication.

TIME & FREQUENCY BASIS FOR ISSUANCE

PERMANENT (CLASS 1) Only	SEMI-PERMANENT (CLASS 2) Only	TEMPORARY & RESTRICTED TRIP (CLASS 3) Miscellaneously
Appliance Park G. E. Employees	Contractor Personnel Contractor Trucks & Equipment	AP-GE Employees Outside Delivery & Pick-Ups (GE) " " " " (Contr) Service Representative (GE) " " (Contr) Vendors (GE) " (Contr) Public Utility Representative Union Representative (Contr) " " (After Hours - GE) Medical & Physically Handicapped (GE)

SHAPE

Rectangular (CLASS 1) (Rounded Corners)	Oval (CLASS 2)	Round - General Electric Employees (CLASS 3) Diamond - All Others (CLASS 3)

MATERIAL

Decal Sticker (CLASS 1) (Numbered)	Plastic-Suction Cup (CLASS 2) (Numbered)	Plastic-Suction Cup (CLASS 3) (Numbered)

SIZE

2 1/2" x 1 1/2" (CLASS 1)	2" x 3" (CLASS 2)	Round - 2 1/2" Diam. (CLASS 3) Diamond - 3" x 4 1/2" (CLASS 3)

LENGTH OF ISSUANCE

2 (CLASS 1) Job Employment Period and/or Annually & Change of Vehicle by Assignee	(CLASS 2) Period of Contract or Period of Temp. Need or visit, extending beyond 8 hours. Change of Vehicle by Assignee	(CLASS 3) Diamond - (Blue) More than 1 trip (one or more days) " - (Yellow) 1 Trip (1 - 8 Hours) Round - Period of temporary need or visit as indicated by request.

TYPES ISSUED IN EACH CLASS (SEE PAGES 2 and 3 FOR TYPE DESCRIPTION)

(CLASS 1) Types	(CLASS 2) Types	(CLASS 3) Types
I; II (b); III (a); III (b);	II (a); III (c);	ROUND I; II (b). III (d) DIAMOND IV (Blue); IV (Yellow)

General Counsel's Exhibit 4.

APPLIANCE PARK WINDSHIELD STICKER IDENTIFICATION SYSTEM

TYPE PRIVILEGES:

TYPE I. ROVING-UNLIMITED-PARKING (Ref: Par. (1) Page 2, Plant Protection Bulletin #17).

Issued in Class 1 and Class 3 shapes to 4th level supervision and above, or equivalent, either local or visiting General Electric employees, on time need and job basis. Issued by Manager-Plant Protection & Communication upon receipt of authorization from proper source. Numbered serially. Color: Red and yellow diagonal combination with blue lettering.

Indicates privilege of entering premises at any time with passengers through any G. E. Gate (use of contractor gates prohibited). Indicates privilege of driving anywhere on premises and parking any place necessary. Members of family also permitted to drive cars identified with this sticker in and out of all G. E. Gates, for passenger pick-up purposes. Non-transferable.

TYPE II.

(a) *ROVING-LIMITED-PARKING (CONTRACTOR VEHICLES).* Ref: Par. (6) Page 3, Plant Protection Bulletin #17.

Issued in Class 2 shape, size and material to contractor personnel, *et cetera*, as listed on Page

General Counsel's Exhibit 4.

1, for a job requiring roving privileges. Issued by Chief-Plant Protection following receipt of written authorization for issuance from G. E. Superintendent (or higher) of department concerned with the instant contract. Expires upon termination of contract. Contractor must return permit to Plant Protection upon transfer or termination of employment and/or contract. Numbered serially. Color: Red background with black lettering.

Indicates parking permitted near the job in proper manner. Permits brief use of vacant visitors spaces between buildings, and utility lot spaces, on necessity basis. Permits roving of premises on job need basis and driving on Main Street prohibited except for job need basis. All passengers shall produce proper G. E. contractor identification when using gates. Vehicle is subject to security inspection at any time. Cannot enter premises via contractor gates when carrying G. E. employees, and shall enter premises via contractor gates, only, at all times. Non-employee members of family cannot use to enter premises. Record of Liability Insurance required. Non-transferable.

(b) Issued in Class 1 and Class 3 shapes as indicated on Page 1 to Local General Electric personnel "exceptions" as outlined by Par. (3) Page 3, Plant Protection Bulletin #17, on job need basis. Issued by Manager-Plant Protection & Communication. Request for issuance must be ini-

tiated by a Section Manager. Numbered serially. Color: Red background with blue lettering.

Permits use of any G. E. Gate (use of contractor gates forbidden). Permits roving on premises during regular shift and overtime hours but use of Main Street at any time prohibited except on job need basis. Permits near-the-job parking in proper manner. Permits brief use of vacant visitor spaces between buildings and Utility Lots, on necessity basis. Members of family also permitted to drive cars identified with this sticker in and out of all G. E. Gates for passenger pick-up purposes. Employee or other identification required of all passengers and driver. Subject to security inspection at any time. Expires upon transfer or termination of employment and must then be removed from windshield. Non-transferable.

TYPE III. PARKING AREA PERMIT (Restricted to specific General Electric employees-Main Parking lots).

(a) *NORTH, INTERMEDIATE & SOUTH LOTS (ONLY).*

Issued in Class 1 shape to General Electric Appliance Park employees only. Issued by Employees Services Office (Per Building) and Plant Protection. Numbered serially. Color: White background with blue lettering.

Indicates privilege of entering via Gates 2 and 5 all shifts, to park in North, Intermediate and

South Main Parking Lots. Subject to security inspections at all times. Expires upon termination of employment (or annually) and must then be removed from windshield: Members of family may drive on to premises with this permit, via Gates 2 and 5. Non-transferable to other vehicles.

May 29, 1957 Page 3

APPLIANCE PARK WINDSHIELD STICKER IDENTIFICATION SYSTEM

TYPE III.

(b) *UTILITY BUILDING LOTS (ONLY)*

Issued in Class 1 shape to General Electric Appliance Park Utility Building employees and their car pool riders. Issued by Chief-Plant Protection, following receipt of written authorization for issuance from G. E. Utility Building Superintendent. (NOTE: When issued to car pool members normally using the North, Intermediate and South Lots, shall be combined with sticker Type III (a) to indicate transit privileges only through Utility areas, and required parking in main lots. Driving on Main Street prohibited at any time.) Numbered serially. Color: White background, blue triangle and blue lettering.

Indicates privilege of entering premises via Gates 2, 3, 4 and 5 during regular shift hours or for overtime work. Permits parking only in

assigned Utility Lot. Prohibits roving. Non-employee members of family, and employee members of family, not assigned to pools in Utility areas are denied privilege of driving car identified with this permit into Utility areas, but may make passenger pick-ups with same on Main Parking Lots via Gates 2 and 5. Driving on Main Street prohibited except on job need basis. Subject to security inspection at any time. Expires upon transfer or termination of employment and then must be removed from windshield. Non-transferable.

(c) *CONTRACTOR LOTS (Restricted Specifically To Contractor Lot Parking Only).*

Issued in Class 2 shape, size and material to contractor personnel, et cetera, as listed on Page 1, with jobs *not* requiring vehicular roving privileges. Issued by Plant Protection Department at this office (Building #28) and Gate House #3, upon authority of contractor supervision. Expires upon termination of contract, transfer or termination of employment, at which time must be turned in to Gate Guard (3) upon final exit. Numbered serially. Color: White background with black lettering.

Indicates parking permitted in specified contractor lot only. Vehicular roving prohibited. Driver and all passengers shall produce proper G. E. contractor identification when entering gates if requested. Vehicle subject to security

inspection at any time. Cannot enter premises via contractor gates while carrying G. E. employees, and shall enter premises via contractor gates, only, at all times. Members of family and friends denied privilege of entering premises with this sticker. Non-transferable.

(d) *RESERVED PARKING, TEMPORARY—Medical.* (Ref: Par. (2) Page 2, Plant Protection Bulletin #17).

Issued in Class 3 shape, size and material. Issued by Manager—Plant Protection & Communication usually upon advice of physician or Central Medical Dispensary, as especially adaptable to temporary medical cases. Issuance only on short-time, temporary basis. Numbered serially. Color: White background with Red Cross in center and blue lettering.

Indicates privilege of entering premises via Gates 2, 3, 4 and 5. Driving on Main Street prohibited. Permits parking in vacant visitor spaces between buildings. Subject to security inspection at any time. Members of family cannot drive car identified with this permit anywhere on premises except main lots. Must be turned in to Manager—Plant Protection & Communication upon termination of need. Non-transferable.

General Counsel's Exhibit 5.

TYPE IV. *RESTRICTED TRIP PERMITS.*

Issued as indicated on Page 1, Class 3. In yellow color for 1-trip purpose; in blue color for more than 1-trip. Permits use of shipping and receiving areas; other loading and unloading areas; use of Utility Parking Lots; visit or parking space between buildings. Issued by Guards at Gates 3 and 4 through Gate Register record after telephone clearance by proper supervision. Chief—Plant Protection will instruct Gate Guards to issue the blue pass for period extending beyond one day, upon authorization of a department superintendent or higher.

General Counsel's Exhibit 5.

SUBJECT: PLANT PROTECTION BULLETIN #9—APPLIANCE PARK, KENTUCKY—January 20, 1954

Procedure for Handling General Electric Direct Contractors Through Special Gate 3A

MESSRS:

LW Atchison	R Johnson
HJ Benzie	GJ Kane
H Bernadt	CW Kaebnick
HH Bixler	GF Kelley
EH Boddy	JM Kite
RF Bowen	JL Knight
GH Boyles	A Lindemeyer
WL Breault	WH Manvel
M Brown	LH Means

General Counsel's Exhibit 5.

WE Casey	JW McNairy
F Cassell	K Muellerstein
JW Coburn	HA Oliphant
PR Cosby	RF Osborn
JJ Cone	JA Patterson
NJ Curlee	BF Peterson
WL Clay, Jr.	JR Poteat
HL Disco	CK Rieger
HB Donley	
JK Driscoll	CA Rystogi
JH Erikson	JE Ryan
CM Fair	RS Schmitz
RW Fillback	GM Sheehan
EJ Fisher	JJ Slattery
EE Folsom	TJ Snodgrass
LO Geier	HE Stocking
GW Grant	LH Strobel
WL Goodfleisch	LU Sisson
JH Goss	CE Sonnemann
RA Guernsey	WM Timmerman
EM Haines	CD Thompson
GC Henry	JW Vonderheide
DR Hughes	PA Wassmansdorf
HT Hulett	WC Watson
GS Hill	LC Welsh
AJ Eilers	WC Watson
HB Miller	FM Welther

The purpose of this bulletin is to facilitate the ingress and egress of GE Direct Contractors' personnel at Appliance Park through Special Gate #3-A and to improve security

measures for controlling the outgoing materials, tools and equipment that are used by these Direct Contractors. In the event of labor difficulties with the various AFofL Craftlocals this separate entrance gate for Direct Contractors' employees should also minimize the possibility of picketing our regular entrances, Gates #2, #3 and #5 used by GE employees. This latter gate was previously designated as Gate #4 in Plant Protection Bulletin #8 dated January 5, 1954.

In this procedure the term "General Electric Direct Contractors" means a direct contractor other than Turner-Struck. All subcontractors of the General Electric Direct Contractors are also covered by this instruction.

1. The names of all present and future General Electric Direct Contractors and their employees engaged in performing work at Appliance Park should be given to the Plant Protection Section in writing by the Plant Engineering Section of the Appliance Park Project Department.

2. All GE Direct Contractors and their subcontractors before starting work will secure their GE Contractors Identification Badges and Car Stickers by coming through GE Direct Contractors Gate #3-A and stopping at GE Guard House #3. They will be given a copy of the following company rules to which they will be subject while working at Appliance Park. These rules stipulate strict adherence on the part of the contractors to our fire prevention regulations governing all welding and cutting operations.

General Counsel's Exhibit 5.

CUTTING AND WELDING PERMIT

After the supervisor of the GE Direct Contractor and the GE Dept. Supvr. where the work is to be done have made certain that conditions are safe, the operator shall then be given a signed permit by the GE Dept. Supervisor. No work shall be permitted without a written permit. By observing this procedure, serious fire hazards will be greatly reduced.

– 2 –

A sample permit form that is being used successfully by many large industrial plants is shown below:

General Electric Co.—Appliance Park, Ky.

GE Direct Contractor & Subcontractors Permit For Cutting & Welding with Portable Gas or Electric Equipment. Good only for the location and time shown below.

Return this permit when job is completed to the GE Supvr. who authorized the work.

DATE .....

TIME STARTED ..... FINISHED .....

BUILDING ..... FLOOR .....

BLDG. COLUMN LINE DESIGNATION .....

DEPARTMENT .....

NATURE OF JOB .....

.....

.....

OPERATOR .....

General Counsel's Exhibit 5.

All fire precautions listed on reverse side of this permit have been complied with and permission is given for this work.

SIGNED .....
Contractors Supv. in Charge of Welding

SIGNED .....
GE Dept. Supv. Where Work is Being Performed.

(See other side)

Form No. MA ....

Precautions against Fire to be complied with by the Welding Operators, the GE Department Supervisors, and the GE Direct Contractors' Supervisors.

CHECK X ITEMS BELOW

1. Obtain a written permit before using portable cutting or welding equipment anywhere in the plant except in permanent safeguarded locations. ....

2. In areas that are equipped with sprinklers, the GE Dept. Supvrs. should contact the Plant Protection Section to make sure that the sprinklers are in operating condition. ....

3. Before welding operations are started, sweep floor clean, wet down wooden floors, or cover them with sheetmetal or equivalent. When doing outside work, prevent sparks from entering doors or windows. ....

General Counsel's Exhibit 5.

4. Move combustible materials 35 feet away; cover what cannot be moved with asbestos curtains or sheet metal, carefully and completely. ....

5. Station man with hose extinguishers or fire pails to watch sparks and see that they do not start fire. ....

6. After completion, watch scene of work a half-hour for smoldering fires, and inspect adjoining rooms and floors above and below. ....

7. Do not use cutting & welding equipment near flammable liquids, or on closed tanks which have held flammable liquids or other combustibles. Remove inside deposits before working on ducts. ....

8. Keep cutting & welding equipment in good condition. Carefully follow manufacturer's instructions for its use and maintenance. ....

– 3 –

2a. The Plant Engineering Section of Appliance Park Project Department will instruct all personnel of the GE Direct Contractors and their subcontractors, to enter and leave Appliance Park through special Gate #3-A located approximately 150 yards West of the entrance of GE Gate #3 on Buechel Bank Road. The entrance to this gate will have signs reading "ENTRANCE AND EXIT GENERAL ELECTRIC DIRECT CONTRACTORS ONLY". *This gate will be open from 6:00 AM to 10:00 PM, Mondays through Fridays.*

3. If any GE Direct Contractors desire to enter or exit through this special gate, when it is closed, they should

use the outside telephones located on the south side of #3 Guard House or at the #3-A entrance gate, and dial Plant Protection Headquarters, EXtension 2222. A guard will then be dispatched to unlock the gate as soon as possible. There will be a sign posted over the telephone advising GE Direct Contractors' personnel of this procedure.

4. All personnel of GE Direct Contractors and their subcontractors are to park their cars in a special parking lot which *will be located in back of Building #2, west of Main Street.* This lot will accommodate approximately 100 cars. At a future date a similar parking lot will be located in back of Building #4, west of Main Street in a portion of the parking lot which is now used by the Turner-Struck Construction Company and their subcontractors. GE Direct Contractors and their subcontractors will not be permitted to drive their cars and/or trucks in any other location except the two mentioned above, and shall not be permitted to transport or ride any other individuals other than properly authorized and badged GE Direct Contractors' personnel in and out of GE Direct Contractors Special Gate #-A.

5. The G.E. Department Supervisor where the work is performed or Plant Engineering Section Representative shall provide the GE Direct Contractors *with properly signed GE Material Gate Passes whenever it is necessary for them to remove material, tools or equipment from Appliance Park.*

6. Any General Electric Supervisor or Foreman that observes an unsafe welding and/or cutting operation has the authority to immediately stop the operation by doing the following:

General Counsel's Exhibit 5.

a. Give a written notice (Form MA. . . .) to the person or persons who are doing the unsafe welding. The notice to be in duplicate stating as follows:

Date ....., TIME .....,
LOCATION ....., BLDG. .....,

Welding operation of the ..... (Name) Company is to stop immediately until G. E. Plant Protection Section is contacted and permit reinstated.

SIGNED .....
(Full Name of GE Supvr. or Foreman)

Badge No. ....., Department .....,

b. GE Supervisor or Foreman shall give the original to the person or company involved, and shall keep the duplicate copy.

– 4 –

c. GE Supervisor or Foreman shall immediately contact GE Plant Protection and explain the condition or situation to them. GE Plant Protection shall then make an immediate inspection and see that the proper and necessary regulations and precautions pertaining to welding and/or cutting are properly and rigidly adhered to.

7. A contractor, when retained by the General Electric Company must give at least 48 hours advance written notice to the G.E. Department Supervisor where the work is performed or Plant Engineering Section Representative, and the time the work will be completed. On receiving such notice the Supervisor shall immediately inform the Guard

at GE Gate #3 of the time the job will be completed and instruct the guard to obtain all identification badges and parking permits from the contractors' employees who leave the park after the designated time. The contractor shall pay, as liquidated damages, the sum of one ($1) dollar for each identification badge and automobile parking permit that is not surrendered by his employees when due.

E. W. ERNST,
APPLIANCE PARK PROJECT,
Cherokee 7511, EXtension 438.

EW Ernst:mae

General Counsel's Exhibit 7.

COPY

December 27, 1956

PLANT PROTECTION BULLETIN #18
SUBJECT: Separate Gates for Contractors and General Electric Employees.

Plant Protection Bulletin #9, issued January 20, 1954, sets forth procedure for handling contractors through special gate #3A, our Permanent Contractors entrance. That Bulletin also explained the reason for this separate gate.

Since that Bulletin was issued, Gate #6, Temporary Contractors entrance, has been added and this is also strictly a contractors gate. Gate #6 (Temporary Contractors) connects with Poplar Level Road Extension and is intended for the use of contractor personnel engaged in the construction of Building #6.

General Counsel's Exhibit 7.

It is important that all contractor personnel and vehicles, including truck deliveries of contractor material, enter and leave Appliance Park via Gates #3A (Permanent Contractors) or #6 (Temporary Contractors), depending upon where contractor personnel is working or the destination of material to be delivered. Contractor personnel and trucks carrying contractor material will not use any other gate at any time.

It is equally important that General Electric employees entering and leaving Appliance Park do not use Gates #3A or #6. Please make certain that all General Electric personnel under your supervision understand this. This matter is extremely important and it will be appreciated if this is brought to the attention of all employees without delay.

H. J. BENZIE, Manager,
Plant Protection and Communication.

Distribution: L-1, L-2, L-3, L-4, L-5, L-6
Lt. JL Gatton Jr.
Lt. WP Wilson
Lt. EJ Keiter
Guard Ben Jones
Capt. CD Thompson

General Counsel's Exhibit 10.

General Counsel's Exhibit 8.

* * *

19. ENTRANCE TO PROPERTY

The entrance to the site to be used by the contractor and his workmen shall be Gate 3A or another entrance as may be designated by the owner.

* * *

Page 6

General Counsel's Exhibit 10.

From Gate No. 5 1:20 P. M.
Howard R. Muttor
Rec July 30, 1958

PICKET INSTRUCTIONS

PLEASE READ CAREFULLY!!

1. Some trucks have crossed the line. It is of utmost importance that a positive description of the outfit and *most important*, record the name of the trucking company and P U C O number from the *cab* of the outfit. This information should be turned into the Union Hall *immediately.*
2. *License numbers* of all trucks, cars and other conveyors *should be recorded carefully and legibly* and reported to the Union Hall at close of your shift.
3. Be sure of positive identification when recording persons names; these too should be reported to the Union Hall at close of your shift.

General Counsel's Exhibit 10.

4. Above all, conduct yourself as a lady or gentleman. The eyes of the public are upon you.

5. No drinking of intoxicants should be permitted while on duty or anyone reporting for picket duty under the slightest influence should be removed from picket area.

6. Do not park your car in the roadway.

7. G. E. will probably employ the services of professional strike breakers and goons, stand your ground unified in a fight to the end for justice.

8. Discuss the issues that caused the present dispute with those that are mislead into crossing the picket line.

9. Be prompt to relieve pickets on duty. If everyone does his or her part the job will not be difficult.

10. Trace rumors before repeating them as the Company will create them in order to divide our united strength.

Fraternally yours,

JOHN JOHNSON, *President,*
Local 761 IUEAFL CIO.

Prehearing Conference Stipulation.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 15,025.

Pursuant to Rule 38 (k) of the Rules of this Court, the parties subject to the approval of the Court, do hereby stipulate and agree to the following with respect to the issues, and the dates for the filing of the briefs and joint appendix;

I.

STATEMENT OF THE ISSUES

Whether, under the circumstances of this case, the Board properly concluded that petitioner by *picketing* Gate 3A of the General Electric "Appliance Park" plant at a time when General Electric was engaged in a labor dispute with the petitioner violated Section 8 (b) (4) (A) of the National Labor Relations Act, as amended.

II.

THE BRIEFS AND JOINT APPENDIX TO BRIEFS

1. The parties shall, on or before September 10, 1959, designate the portions of the record to be printed in a Joint Appendix. Such Joint Appendix shall be filed on or before October 2, 1959.

2. Petitioner's brief shall be filed on or before November 9, 1959.

3. Respondent's brief shall be filed on or before December 7, 1959.

4. Petitioner's reply brief, if any, shall be filed on or before December 24, 1959.

5. It is further agreed that either party and the Court at or following the hearing in the case, may refer to any portion of the original transcript of record or exhibits herein which has not been printed to the same extent and effect as if they had been printed, or otherwise reproduced, it being understood that any portions of the record thus referred to will be printed in a supplemental Joint Appendix if the Court so directs.

Dated at Washington, D. C. this 26th day of August, 1959.

BENJAMIN C. SEGAL,
Counsel for Petitioner.

MARCEL MALLET-PREVOST,
Counsel for the National Labor Relations Board.

Order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,205. September Term, 1958

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before: Washington, Circuit Judge,
in Chambers.

Upon consideration of the prehearing stipulation submitted by counsel for petitioner and respondent, it is

ORDERED that the stipulation is approved and that the Clerk is directed to file it.

It is FURTHER ORDERED that the prehearing stipulation be printed in the joint appendix and shall control further proceedings in this case unless modified by further order of this court.

Dated: August 27, 1959.

BATAVIA TIMES PUBLISHING CO., BATAVIA, N. Y.
10 23 59 80

[fol. 194] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15205

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

GENERAL ELECTRIC COMPANY, Intervenor.

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board

---

Decided April 18, 1960

Mr. Benjamin C. Sigal, with whom Mr. David S. Davidson was on the brief, for petitioner.

Mr. Melvin J. Welles, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom Messrs. Thomas J. McDermott, Associate General Counsel, National Labor Relations Board, and Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Mr. Gerard D. Reilly for intervenor.

Before Prettyman, Chief Judge, and Wilbur K. Miller and Danaher, Circuit Judges.

[fol. 195] OPINION—April 18, 1960

Danaher, Circuit Judge: Respective counsel for Petitioner (Union) and the Respondent (Board) stipulated that the sole issue may be stated thus:

"Whether, under the circumstances of this case, the Board properly concluded that petitioner by *picketing* Gate 3A of the General Electric 'Appliance Park' plant at a time when General Electric was engaged in a labor dispute with the petitioner violated section 8(b)(4)(A) of the National Labor Relations Act, as amended."[1]

The Union has asked us to review and set aside, and the Board asks enforcement of, its order that the Union cease and desist from inducing or encouraging the employees of certain named contractors "or any other employer, except General Electric Company" to engage in a strike or a concerted refusal in the course of their employment to perform certain work or services where an object is to force or require such employers "or any other employer or person, to cease doing business with General Electric Company."

Intervenor, General Electric (Company) maintains a manufacturing plant at Appliance Park, Louisville, Kentucky, where it produces automatic washers, driers, dish washers and other household appliances. The Company during 1957 shipped in interstate commerce finished products valued in excess of $10 million. Some 13 plant buildings are located on a 1,000 acre tract, substantially square, with about 6,600 feet to the side. Surrounding the area is a ditch of such width and depth that vehicles can enter and leave the premises only on five roadways across culverts. At the entrance and on either side of each roadway are metal stanchions, between which a chain may be fastened to block the movement of vehicles during night hours and on non-working days. These entranceways numbered 2, 3, 3A, 4 and 5, are herein called "gates." To various classes of vehicles the Company's plant protection [fol. 196] department, years before the events here critical, had issued stickers of varying size, shape and color. Each vehicle, whether that of a Company employee, or an employee of a contractor, a supplier or the like could readily be identified by the plant guards simply by examination of the type of sticker carried on the windshield. Em-

[1] 61 Stat. 141 (1947).

ployees of the Company had been authorized to use Gates 2, 3, 4 and 5, but *not* Gate 3A.

The Union in July 1958 called a lawful strike against the Company. At that time the Company had some 10,500 employees at Appliance Park, of whom substantially more than one-half (possibly 7,600) were production and maintenance employees for whom the Union had been certified as bargaining representative. Picketing immediately commenced at all gates, *including* Gate 3A. The picketing was peaceful, the pickets carrying signs reading:

LOCAL 761
ON STRIKE
G.E. UNFAIR

The Company kept the plants open, and it was found that more than 2,000 employees represented by the Union continued to work during the strike as did many others not within the bargaining unit.

The Company at that time had outstanding various contracts with some 12 employers. Their jobs included installation, repair and alteration of equipment, converting machinery for products changeovers, retooling, rearrangement of conveyors, installation of presses and the like. Some employers were constructing a truck dock, erecting an air shelter, and laying in a mezzanine floor in one of the plant buildings. General maintenance work beyond the skills or the available manpower of the Company personnel engaged for that purpose was also let to outside contractors. Some of the work in the various collateral lines had been the subject of such contracts over a period of years.

[fol. 197] In earlier experience, some 22 jurisdictional disputes among the craft union employees of the various contractors had resulted in picket lines at gates normally used by the Company employees, thus keeping out the General Electric employees as well as those of the contractors. By 1954, the Company had issued written instructions to its plant security people that use of Gate 3A was to be limited to the independent contractors and their employees, in order to eliminate interference with access by Com-

pany employees. Likewise, all contractors and their employees had been instructed to enter and to leave the Company premises only through Gate 3A. Thus, the Company had established Gate 3A for the sole and separate use of the contractors and their employees at a point some 550 feet from the next nearest gate.

For some years signs at Gate 3A had carried posted notices of the limitation on permitted use, and at least since January, 1958, a large sign erected there had read:

GATE 3-A
FOR EMPLOYEES
OF CONTRACTORS
— ONLY —
G.E. EMPLOYEES
USE OTHER GATES

The trial examiner's discussion of the case, he said, was "based upon the premise that Gate 3-A was reserved exclusively for contractors, their employees and suppliers, and that the Respondent [Union], in picketing at that Gate, did not seek to solicit any of the Company's employees to cease work." Also he concluded that while the Union's appeal at Gate 3A was to secondary employees only, i.e., to employees of persons other than General Electric, the Union picketing there was part of "traditional primary strike action," and hence was for the same lawful object as the picketing at the other four gates. He recommended that the unfair labor practice complaint be dismissed, hav- [fol. 198] ing concluded that section 8(b)(4)(A) does not protect the business of a neutral employer within the situs of a primary dispute.

The Board substantially adopted the findings of the trial examiner, but disapproved his opinion that the picketing at Gate 3A was "traditional" and was protected by the Act.

The Board found from the record as a whole that only the neutral contractors' employees were permitted to use Gate 3A as the Union was well aware. The Board concluded that the Union's object in picketing at Gate 3A was to "enmesh these employees of the neutral employers in its

dispute with the Company. Such purpose is shown not only by the picketing at gate 3-A but also by the oral appeals to the employees of neutrals not to cross the picket line." The Board therefore based its order on its conclusion that: "the Respondent violated Section 8(b)(4)(A) of the Act by inducing and encouraging the employees of independent contractors to engage in a concerted refusal to work with an object of forcing the independent contractors to cease doing business with the Company."

We think the Board has correctly evaluated the finding of the trial examiner as well as its own. In any of these secondary boycott situations the ultimate determination turns upon the union's *objective*. Often "The line is fine,"[2] and circumstances of the particular case must supply the answer to which way the chips are to fall. Here the question may be stated: was it an object of the strike to induce or encourage the employees of the several contractors—not of the primary employer—to engage in concerted refusal in the course of their employment to perform their own work or to render services so that their employers would cease doing business with General Electric?

[fol. 199] In the *Seafarers* case now relied upon by the Union, we considered such questions and found the union's exercise of its section 13[3] rights was not in violation of section 8(b)(4)(A). There, however, the pickets (1) identified themselves specifically as striking only their primary employer, (2) proclaimed by signs clearly showing that they had no dispute with the secondary employer, (3) distributed leaflets which explained in detail not only their own purpose and the reason picketing was conducted at the particular location, but especially excluded the secondary employer and its employees. Moreover the primary employer had placed its ship in the secondary employer's yards and only thereafter were its employees withdrawn; the ship had no other berth at which the union's organizational efforts might be publicized; and the vessel normally was at sea, months on end, with its crew shifts rotated

---

[2] Seafarers International Union, Etc. v. NLRB, 105 U.S. App. D.C. 211, 216, 265 F.2d 585, 590 (1959).

[3] 61 STAT. 151 (1947), 29 U.S.C. § 163 (1958).

d transported back and forth by helicopter. The operaons as conducted by the primary employer not only had ecluded the possibility of picketing the ship directly, but evidence of the employer's purpose, the primary emoyer during the night placed a crew aboard the vessel nd towed it away. Such circumstances and such conduct, e concluded, made it clear that the union intended—not shut down the neutral's operations, but to conduct lawful rike activities against the primary employer for the chievement of a protected objective.

The situation here is vastly different. When the strike as called in July 1958, the Union picketed all gates, inluding 3A. "Most, if not all, of the independent contracors' employees refused to cross the picket line, and did ot work during the strike," the Board found. Pickets at ate 3A in some cases refused neutral employees permision to get their tools. Others were told to get passes at he Union office. Others were told, in effect, to "Go on fol. 200] home." There was no showing that Company emloyees made any attempt to utilize Gate 3A. We need not letail additional items.[4] It is sufficient to note that the Board's findings do not lack support in substantial evidence n the record considered as a whole, and we are bound by hose findings.[5]

This was no case of a union's seeking "to influence two employees of a customer of the mill not to cross the picket ine."[6] Rather, the Board reasonably could find, as it did ind, that the Union by peaceful picketing to be sure, but effectively nonetheless, sought to encourage the employees f the independent contractors to engage in a concerted

---

[4] One Company employee testified that he had been permitted y a guard to enter that gate on one occasion after January, 1958. o others were shown to have done so. It fairly may be concluded hat Company employees all but exclusively entered the premises t gates reserved for them. On the other hand, numerous emloyees of many independent contractors for years had been using nly Gate 3A.

[5] Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 493 (1951).

[6] Labor Board v. Denver Bldg. Council, 341 U.S. 675, 687 (1951), terpreting the situation in Labor Board v. Rice Milling Co., 41 U.S. 665 (1951).

refusal to perform any services for their employers in the course of their employment and thus to force their employers to cease doing business with the Company.[7]

The objective of the picketing at Gate 3A as so found by the Board brings this case within the statute's range.[8] [fol. 201] The "fine" line must be drawn in favor of the Board's order.

The order of the Board will be enforced.

[fol. 202] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,205

[Title omitted]

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: Prettyman, Chief Judge, and Wilbur K. Miller and Danaher, Circuit Judges.

ORDER GRANTING ENFORCEMENT OF ORDER OF NLRB—
April 18, 1960

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

---

[7] Electrical Workers v. Labor Board, 341 U.S. 694, 701 (1951); Labor Board v. Denver Bldg. Council, 341 U.S. 675, 689 (1951); Retail Fruit & Veg. Clerks U. v. NLRB, 249 F.2d 591, 599 (9 Cir. 1957); cf. Truck Drivers & Helpers v. NLRB, 101 U.S.App. D.C. 420, 249 F.2d 512 (1951), *cert. denied*, 355 U.S. 958 (1958).

[8] And see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113, 1114 (1960). Section 707, 73 STAT. 546, makes it clear that the 1959 Act has no applicability to the situation here.

On Consideration Whereof, it is ordered by this court, hat the order of the National Labor Relations Board on eview in this case shall be enforced.

Pursuant to Rule 38( ) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Circuit Judge Danaher.

Dated: April 18, 1960.

[fol. 203] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15205

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

GENERAL ELECTRIC COMPANY, Intervenor.

JUDGMENT—May 18, 1960

Before: Prettyman, Chief Judge, and Wilbur K. Miller nd Danaher, Circuit Judges.

This Cause came on to be heard upon the petition of ocal 761, International Union of Electrical, Radio and lachine Workers, AFL-CIO to review and set aside an rder of the National Labor Relations Board issued against 'etitioner herein, its officers, representatives, agents, suc- ssors, and assigns on June 8, 1959, and upon the Board's nswer and request for enforcement of said order. The ourt heard argument of respective counsel on February 16, 960, and has considered the briefs and the transcript of

record filed in this cause. On April 18, 1960, the Court being fully advised in the premises, banded down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed by the Court, that the said order of the National Labor Relations Board be and the same is hereby enforced; and that said Petitioner, Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO, its officers, representatives, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

Dated: May 18, 1960.

E. Barrett Prettyman, Wilbur K. Miller, John A. Danaher, Judges, United States Court of Appeals for the District of Columbia Circuit.

[fol. 206] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 207]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NINTH REGION

Case No. 9-CC-158

In the Matter of:

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (AFL-CIO)

and

GENERAL ELECTRIC COMPANY, APPLIANCE AND TELEVISION RECEIVER DIVISION

Courtroom No. 1, U. S. Post Office Building,
Louisville, Kentucky,
Monday, September 22, 1958.

Pursuant to notice, the above-entitled matter came on for hearing at 10:30 o'clock a.m.

Before:

A. Bruce Hunt, Esq., Trial Examiner.

Appearances:

John H. Rogers, Esq. and John H. Arbuckle, Esq.	6 East Fourth St., Room 1200, Cincinnati, Ohio, appearing on behalf of the General Counsel, National Labor Relations Board.
Herbert L. Segal, Esq. Benjamin Sigal. Esq.	403 Republic Building, Louisville, Kentucky; General Counsel, IUE International, 1126 16th St., N.W., Washington, D. C.; and
John Johnson,	President, Local 761, IUE-AFL-CIO, 5153 Poplar Level Road, Louisville, Kentucky; on behalf of the Respondent.
W. L. Clay, Jr., Esq.	Attorney, General Electric Company, Appliance Park, Louisville, Kentucky, on behalf of the Charging Party.

* * * * * * *

fol. 208] Wilber Goodfleisch, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rogers:

Q. Mr. Goodfleisch, you are employed by General Electric as manager of manufacturing engineering in the household refrigerator department, isn't that right.

fol. 209] A. That's right.

Q. How long have you held that position?

A. Approximately four and a half years.

Q. Now in your duties in that position, a part of your responsibility is to obtain bids and let contracts to independent contractors, is that right?

A. Right.

• • • • • • •

[fol. 210] Cross examination.

By Mr. Segal:

• • • • • • •

Q. Did Central Maintenance bid on all of these contracts?

A. Not on all of them.

[fol. 211] Q. Did they bid on any of them?

A. Yes.

Q. Would you please tell us, sir, which ones?

Mr. Rogers: May the record note an objection to this entire line of questioning?

May I have a standing objection to this entire line of questioning?

Trial Examiner: I will overrule the objection to this question.

Name the ones on which Central Maintenance bid.

The Witness: Well, to my knowledge, specifically, they bid on the job as reported in my affidavit, by the Hatfield Electric Company, 2434 Crittenden Drive, Louisville.

Trial Examiner: A local organization?

By Mr. Segal:

Q. A local independent contractor. Is that the bid, sir?

A. Yes, sir.

Q. And what was the Hatfield Electric Company to do?

A. They were to do the associated electrical work connected with rearrangement of our manufacturing facilities, the major job of which was being performed by Servic Erection.

Q. I see. And in what building was this, sir?

A. Building 5.

Q. And I assume that the Central Maintenance bid was rejected and Hatfield got it?

fol. 212] A. To the contrary. Earlier this work was being lanned and organized early in the year, let's say, in Janury and February. We had approached Central Maintenance with the idea that they do this electrical work and ney had assured us that they probably would. However, ney work on a first come, first served basis. By the time e got our engineering straightened around to where the ob could be properly bid, Central Maintenance announced nat they had sufficient work to more than occupy the time f their electrical people and therefore they would not do nis job, so we turned around rather quickly and placed ne job outside.

* * * * * * *

---

fol. 213]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—July 8, 1960

Upon Consideration of the application of counsel for etitioner,

It Is Ordered that the time for filing petition for writ certiorari in the above-entitled cause be, and the same hereby, extended to and including August 16th, 1960.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

ated this 8th day of July, 1960.

[fol. 214]

SUPREME COURT OF THE UNITED STATES

No. 321, October Term, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD et al.

ORDER ALLOWING CERTIORARI—October 24, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

GENERAL ELECTRIC COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BENJAMIN C. SIGAL,
EDMOND F. ROVNER,
DAVID S. DAVIDSON,
1126 16th Street, N. W.,
Washington 6, D. C.

Attorneys for Petitioner.

HERBERT L. SEGAL,
[illegible] Republic Building,
Louisville, Kentucky,

Of Counsel

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
A. The Facts	2
B. The Trial Examiner's Findings and Conclusions	6
C. The Board's Conclusions and Order	6
D. The Decision of the Court Below	7
Reasons for Granting the Writ	7
1. The Decision of the Court Below is in Conflict With Decisions of this Court	7
2. The Decision of the Court Below is in Conflict with Decisions of Other Circuits	10
3. The Decision is Not Affected by Amendments to the Statute	12
4. The Issue is of Utmost Importance	14
Conclusion	18
Appendix A	19
Appendix B	29

TABLE OF AUTHORITIES

Chauffeurs Local No. 200 (Milwaukee Plywood Company), 126 NLRB No. 80	17
DiGiorgio Fruit Corp. v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 191 F. 2d 642 (C.A. D.C.), cert. den. 342 U.S. 869	9
Interborough News Company, 90 NLRB 2135	16, 17
Local No. 36 International Chemical Workers Union, (Virginia-Carolina Corp.), 126 NLRB No. 117	14
Local 618, Automotive Employees Union v. *N.L.R.B.*, 249 F. 2d 332 (C.A. 8)	10, 11
Local 1976, United Brotherhood of Carpenters v. *N.L.R.B.*, 357 U.S. 93	12

Page

N.L.R.B. v. *Denver Building Trades Council*, 341 U.S. 675 ..... 8, 9

N.L.R.B. v. *International Rice Milling Co., Inc.*, 341 U.S. 665 ..... 7, 8, 9

N.L.R.B. v. *Service Trade Chauffeurs*, 191 F.2d 65 (C.A. 2) 11

Piezonki v. *N.L.R.B.*, 219 F.2d 879 (C.A. 4) 11

Pure Oil Company, 84 NLRB 315 16

Retail Fruit and Vegetable Clerks Union, Local 1017 v. *N.L.R.B.*, 249 F.2d 591 (C.A. 9) 11

Teamsters, Local 87 (Di Giorgio Wine Company), 87 NLRB 720 17

Union De Trabajadores (Gonzalez Chemical Industries, Inc.), Cases Nos. 24-CC-64, 24-CB-329, 24-CB-330, released Nov. 25, 1959 15

United Electrical Workers (Ryan Construction Co.), 85 NLRB 417 8

United Packinghouse Workers (Wilson & Co., Inc), Case No. 17-CC-110, released Feb. 23, 1960 ..... 14, 15

United Steelworkers of America, (Phelps Dodge Refining Corp.), 126 NLRB No. 168 14

United Steelworkers of America (Tennessee Coal & Iron Division, United States Steel Corporation), 127 NLRB No. 97 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. ———

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

GENERAL ELECTRIC COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO, prays that a writ of certiorari issue to review the decision and decree of the United States Court of Appeals for the District of Columbia Circuit, entered on April 18, 1960, enforcing an unfair labor practice order issued by the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court below (Appendix A. *infra*, pp. 19-25) is reported at 278 F. 2d 282, —U.S. App. D.C. —. The Decision and Order of the Board (J.A. 37-46)[1] are reported at 123 NLRB No. 180.

[1] The reference "J.A." designates the portion of the record printed as a joint appendix to the briefs of the parties in the court below.

JURISDICTION

The decision and order of the court below (Appendix A, *infra*, pp. 19-26) were entered on April 18, 1960, and its decree (Appendix A, *infra*, pp. 27-28) on May 18, 1960. On July 8, 1960, by Order of Mr. Justice Black, the time for filing the Petition for Writ of Certiorari herein, was extended to August 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. 160(e) and (f), hereafter called the Act.

QUESTION PRESENTED

Whether a union violated Section 8(b)(4)(A) of the National Labor Relations Act, by picketing at a gate to an Employer's manufacturing plant premises where (1) the Employer had restricted the use of that gate to employees of independent contractors working on the Employer's premises, (2) the Union was engaged in a labor dispute with the Employer whose employees the Union represented, and (3) the Union was simultaneously engaged in picketing at all other entrances to the Employer's plant premises.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are set forth in Appendix B, *infra*, pp. 29-30. This case arose and is governed by the provisions of the Act as they appeared prior to amendments of 1959.

STATEMENT

A. The Facts

Petitioner has been, at all time material, the collective bargaining agent for the production and maintenance employees at the General Electric Company's Appliance Park, Kentucky installation (J.A. 38; 49). Appliance Park is composed of 13 buildings, located in a 1000 acre tract (J.A. 38; 51). Six of the 13 buildings are used directly for manu-

facturing and the other buildings augment this function (J.A. 38; 51). At the time of the events herein, there were approximately 10,500 people employed by General Electric Company, Intervenor below, in Appliance Park, about 7600 of whom were in the collective bargaining unit (J.A. 38; 61).

Appliance Park is located about 10 miles from Louisville, Kentucky, and the overwhelming majority of the employees drive to work by private car (J.A. 38; 57). Access to Appliance Park by automobile can be obtained through any of five gates (J.A. 38; 52). Once a car enters any of these gates, there is no impediment to movement between buildings (J.A. 64-65, 115).

One of the five gates to Appliance Park is named gate 3-A (J.A. 38; 49). This gate had been designated by General Electric for the use of employees of independent contractors who do work for General Electric in Appliance Park (J.A. 39-40). General Electric asked the contractors to have their employees use gate 3-A because General Electric hoped that, in the event of a strike of the employees of any of the contractors, the union on strike would restrict picketing to this gate and not picket the other gates at Appliance Park, and thereby impede General Electric's employees from using the other gates (J.A. 39; 66, 179). A sign was placed over the gate which read:

"Gate 3-A
FOR EMPLOYEES
OF CONTRACTORS
—ONLY—
G.E. EMPLOYEES
USE OTHER GATES" (J.A. 40; 140, 170)

Instructions were given to plant guards to direct General Electric Company employees who might appear at gate 3-A to use other gates, but General Electric employees were not informed that these instructions were given (J.A. 58-60).

The guards were employed and supervised by General Electric Company (J.A. 68-69, 165-166).

On July 27, 1958, employees represented by Petitioner instituted a lawful strike based on 24 unresolved grievances (J.A. 41; 49). On the morning the strike started, pickets were stationed at all five gates leading to Appliance Park (*ibid.*). General Electric did not make any offer to Petitioner to restrict gate 3-A to contractors employees during the strike nor did it take any steps to insure such restrictive use of the gate (J.A. 20; 134-136).

The pickets at all gates carried similar signs which read:

"Local 761
ON STRIKE
GE UNFAIR" (J.A. 41; 133-134)

Neither the signs, nor the statements made by the pickets, nor Petitioner's representatives, indicated that any employees other than those of General Electric were on strike at Appliance Park. There is no evidence that Petitioner, or any of its representatives, approached the unions which represented the contractors' employees to solicit cooperation in causing a cessation of work at Appliance Park. Contacts between Petitioner and the contractors' employees occurred as the contractor's employees individually or in one instance in a group of three approached the gates of Appliance Park. In a few instances, contractors' employees and supervisors appeared on their own initiative at Petitioner's headquarters. (J.A. 41; 78, 79, 85, 87, 88, 97, 98).

The independent contractors were engaged to perform maintenance and construction work, in many instances identical to the work which the General Electric employees could, and did, perform (J.A. 15-16; 56, 62, 84-85, 147). The majority of the work done by the independent contractors' employees was performed in the manufacturing

building where Petitioner's members normally work (J.A. 62-63). Some of the work which was to be done by the contractors was on projects for which estimates were received both from the General Electric maintenance division in Appliance Park and also from outside contractors, and the outside contractors submitted the lower bid (J.A. 15; 124-125). In one instance, the GE maintenance division had been given the assignment but lacked sufficient personnel to complete the work, and an outside contractor was given the assignment (J.A. 15).

At the outset of the strike and through its entire course, i.e., July 27, 1958-August 10, 1958, General Electric made public solicitations to its employees to go through Petitioner's picket lines to work (J.A. 135). Approximately 2000 of the 7600 employees in Petitioner's bargaining unit did, in fact, go through the picket lines and perform work during the strike (J.A. 18; 63). In addition, some of the contractors' employees also went through the picket line and performed work (J.A. 41; 75, 116).

Most of the employees of the independent contractors declined to work at Appliance Park during the strike (J.A. 18, 41, 85-87). Some of them asked Petitioner for passes to go through the picket line to secure personal tools which had been left in the plant. Such passes were issued on request (J.A. 18, 82, 97). Many of the contractors' employees who did not cross the picket line at Appliance Park during the strike were dispatched by the contractors to other projects on which each contractor was then working (J.A. 78, 83). None was asked by Petitioner to refuse to perform such work. Picketing at gate 3-A was enjoined by decree of the Federal District Court on August 9, 1958, and was stopped on that date (J.A. 41; 134).

B. The Trial Examiner's Findings and Conclusions

The Trial Examiner found that Appliance Park was not a "commons situs" occupied by both General Electric Company and its contractors, and that General Electric Company does not "share its premises" with the contractors (J.A. 21-22). Accordingly, he found that this picketing at the primary employer's place of business was not a secondary boycott. He found that gate 3-A was merely an access to the primary site of the labor dispute, and consequently regardless of whether it was customarily used exclusively for the independent contractors' employees, Petitioner had a right to picket the gate. He further found that the object of the picketing was to halt the operations of the struck plant by appeals directed collectively (a) to the Company's employees at gates 2, 3, 4, and 5, (b) to the consuming public at all gates, (c) to secondary employees who were engaged in transporting raw materials and finished products and who used gates 3 and 4, and (d) to the contractors' employees at gate 3-A. He found that there was no intent to induce or encourage the secondary employees to cease work at any place other than at Appliance Park. He concluded that appeals to secondary employees were "valid primary activity with secondary effects". (J.A. 34.)

C. The Board's Conclusions and Order

Respondent Board found that Petitioner violated Section 8 (b) (4) (A) of the Act. Without finding that the Employer's premises were a "common situs," Respondent found that Petitioner's object in picketing gate 3-A was "to enmesh these employees of the neutral employers in its dispute with" General Electric Company (J.A. 42). The Board ordered that Petitioner cease and desist from such activity.

D. The Decision of the Court Below

The court below granted enforcement of the Board's order and denied Petitioner's petition for review. The court held that the ultimate determination depended upon the objective of the Union's activity at Gate 3-A. In the court's view, this case raised only a substantial evidence question, and the court rejected Petitioner's contention that a critical question of statutory interpretation was involved. The court concluded that there was substantial evidence to support the conclusion that Petitioner's objective was to encourage the employees of the neutral employers to engage in concerted refusal to perform services in the course of their own employment. The court concluded that "The 'fine' line must be drawn in favor of the Board's order," and affirmed the Board's finding that Petitioner's picketing at Gate 3-A violated Section 8 (b)(4). The court rejected Petitioner's contention that its conduct constituted lawful traditional primary activity. (Appendix A, *infra*, pp. 19-25).

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below is in Conflict With Decisions of this Court.

The conclusion of the court below that the inducement of employees of the independent contractors at Gate 3-A violated Section 8(b)(4) is in conflict with the decision of this Court in *N.L.R.B.* v. *International Rice Milling Co., Inc.*, 341 U.S. 665. There the question squarely raised before this Court was whether inducement of employees of neutral employers to refuse to enter a struck employer's premises violated Section 8 (b)(4) of the Act. There the striking union directly and forcibly induced and encouraged two employees of a trucker not to enter a struck plant and thereby to refuse in the course of their employment to transport articles for their employer for the purpose of forcing him

to cease doing business with the struck employer. This Court held that:

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore such actions do not come within the proscription of Section 8 (b)(4), and they do not here."

In the instant case, the picketing at the segregated Gate 3-A, where contractors' employees entered, cannot be distinguished in any material respect from the inducement of the employees of neutral employers in the *Rice Milling* case. In both cases, the inducement of employes of neutral employees occurred at the primary employers' premises and was restricted to appeals not to enter the primary employers' premises. There were no inducements of employees of neutral employers to refuse to perform services at any other location.

In disposing of the *Rice Milling* case with the single observation that "This was no case of a union's seeking 'to influence two employees of a customer of the mill not to cross the picket line'," the court below has misinterpreted this Court's decision in the *Rice Milling* case and its decision in *N.L.R.B. v. Denver Building Trades Council*, 341 U. S. 675. While the *Rice Milling* decision was based on the absence of inducement of a "concerted refusal" to perform services, it was not based on the fact that only two secondary employees were involved. Any number of employees greater than one may engage in concerted activity. As the Board observed in its decision in *United Electrical Workers (Ryan Construction Co.)*, 85 NLRB 417, cited by this Court at footnote 6 of its *Rice Milling*

opinion, where the facts were strikingly similar to those of the instant case, "It makes no difference whether 1 or 100 other employees wish to enter the premises". Rather the finding that there was no inducement of a concerted refusal rested upon the principle "that such conduct was no more than was traditional and permissible in a primary strike. The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill." *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675, 687. Far from viewing the appeal to employees of neutral employers in the *Rice Milling* case as a limited exception to a sweeping proscription against picketing, this Court in *Rice Milling* took pains to observe that Section 8 (b)(4) must be narrowly and strictly read as a dimunition of the union's traditional right to strike, guaranteed by Section 13 of the Act. Fundamental to the conclusions reached in the *Rice Milling* decision is the fact that the picketing there under scrutiny was "in a manner traditional in labor disputes":

This interpretation of Section 8 (b)(4) and the *Rice Milling* and *Denver Building Trades* decisions was previously accepted by the court below in its majority opinion in *DiGiorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D. C. 155, 191 F. 2d 642 (C.A. D.C.), cert. den. 342 U.S. 869. In sum, the conclusion of the court below is in direct conflict with the holding of this Court, previously accepted by the court below, that inducements directed at employees of neutral employers as they approach the picketed premises of a struck primary employer, are traditional appeals which are encompassed by the right to strike guaranteed by Section 13 and not interdicted by Section 8(b)(4).

2. The Decision of the Court Below is in Conflict with Decisions of Other Circuits.

The decision of the court below is also in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Local 618, Automotive Employees Union* v. *N.L.R.B.*, 249 F.2d 332 (C.A. 8), and the decisions of other circuits interpreting the *Rice Milling* decision. In the cited case, the striking union had a dispute with the operator of fourteen retail gas stations in the St. Louis area. After a period of picketing all fourteen stations simultaneously, the union began picketing the stations intermittently with roving pickets moving from station to station. Thereafter, the Company closed one of the stations, withdrawing all its employees, with the intention of rebuilding the station and reopening the station after the completion of construction. Following the closing of the station, the striking union picketed at that station when employees of contractors arrived at the site to engage in the construction work.

Despite the absence of any employees of the primary employer at the site of the station and the availability of thirteen other stations in the area at which picketing could be carried on, the court concluded that the picketing at the closed station did not violate Section 8(b)(4). The court found that the inducement of the contractor's employees did not differ materially from that in the *Rice Milling* case, but that even if it were assumed that there was inducement of a concerted action on the part of the contractor's employees, the picketing was not proscribed. It held that in the case of a continuing strike at a primary employer's premises, it is insufficient to find that an object of the striking union is to compel the neutral employees to cease doing business with the struck employer. In such circumstances, the court concluded, in order to sustain a finding that Section 8(b)(4) had been violated, the Board must

establish that the picketing had no legitimate purpose in connection with the primary strike.

In both the instant case and the *Local 618* case, the picketing was carried on at locations at which employees of the primary employer were not likely to enter the primary employer's premises because of action taken by the primary employer. In both cases there were other entrances to premises occupied or used by employees of the primary employer at which picketing was carried on, and the primary dispute was publicized.

Other circuits, while not confronted with similar facts, have indicated similar views of Section 8(b)(4) and the *Rice Milling* decision. In *N.L.R.B.* v. *Service Trade Chauffeurs*, 191 F.2d 65 (C.A. 2) the Court of Appeals for the Second Circuit stated with respect to the holding in *Rice Milling:*

> "We take this to mean that a union may lawfully inflict harm on a neutral employer, without violating Section 8(b)(4), so long as the harm is merely incidental to a traditionally lawful primary strike, conducted at the place where the primary employer does business."

Likewise, in *Piezonki* v. *N.L.R.B.*, 219 F.2d 879, (C.A. 4), the Court of Appeals for the Fourth Circuit stated:

> "This is not a case like [International Rice Milling] where the picketing was directed solely at the manufacturing company whose plant was picketed and where interference by the picket line with trucks attempting to make deliveries to the plant was incidental to the primary picketing."

In *Retail Fruit and Vegetable Clerks Union, Local 1017* v. *N.L.R.B.*, 249 F.2d 591 (C.A. 9), the Court of Appeals for

the Ninth Circuit in finding a violation in circumstances which it described as "unique" focused upon the statement of this Court in its *Rice Milling* decision "That Congress did not seek by Section 8(b)(4) to interfere with the ordinary strike."

The inapplicability of Section 8(b)(4) to the instant case is also reflected in the general statement of this Court in *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, that Section 8(b)(4) was "aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods."

3. The Decision is Not Affected by Amendments to the Statute.

The question presented in this petition continues to be of importance. The 1959 amendments to Section 8(b)(4) make no change material to this question. Insofar as material Section 8(b)(4) now provides:

"8 (b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike, or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is: . . .

(B) forcing or requiring any person to cease using,

> selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of this title: *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .
>
> "*Provided*, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter . . ."

While the *Rice Milling* decision speaks of "concerted refusal", the words which appeared in Section 8(b)(4) prior to the amendments, the deletion of the word "concerted", for the purpose of interdicting appeals to individual employees to engage in secondary activities away from the primary employer's premises, was not intended to restrict the scope of traditional primary picketing. This intent is made clear by the addition of the proviso to the present Section 8(b)(4)(B): "Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The legislative history pertaining to this proviso shows that it was intended "to make it clear that the changes in Section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the

site of a primary labor dispute." Conference Report, H. R. No. 1147 on S. 1555, 8th Cong., 1st Sess., p. 38. See also: 105 Daily Congressional Record 15905, August 28, 1959; Intermediate Report of Trial Examiner Arthur Leff in *United Packinghouse Workers, AFL-CIO (Wilson & Co. Inc.)*, Case No. 17-CC-110, released Feb. 23, 1960.

Indeed, the instant case will to a large extent determine what the "present rules of law permitting picketing at the site of a primary labor dispute" are, and will have a vital impact not only upon the interpretation of the provisions of Section 8(b)(4) prior to the 1959 amendments but also upon the Act as now amended.

4. The Issue is of Utmost Importance.

The resolution of the conflict in decisions and of the question of federal law presented by the holding of the court below with respect to the extent to which striking employees may appeal to neutral employers in the course of primary picketing is of the utmost importance in the administration of Section 8(b)(4). The success of any strike depends upon the ability of striking employees to enlist the aid of other workers and the public generally, to lend them support in their dispute. Foremost among the traditional forms of aid is honoring the picket line and refusing to enter struck premises. By administrative decision the Board has emasculated the right of striking employees to seek such aid.

Since the issuance of the Board's decision in the instant case, there have been three additional decisions of which Petitioner is aware, issued by the Board applying this decision,[2] and two additional cases pending before the

---

[2] *Local No. 36, International Chemical Workers Union (Virginia-Carolina Corp.)*, 126 NLRB No. 117; *United Steelworkers of America (Phelps Dodge Refining Corp.)*, 126 NLRB No. 168; *United Steelworkers of America (Tennessee Coal & Iron Division, United States Steel Corporation)*, 127 NLRB No. 97.

Board upon Trial Examiner's Intermediate Reports in which the rule of this case has been invoked by the General Counsel.[3] In one of the latter cases, the *Gonzalez* case, the General Counsel seeks to apply the decision in the instant case to preclude direct appeals to employees of neutral employers at a *single* common entrance to the primary employer's premises used by employees of both the primary employer and the neutral employers entering the primary employer's premises. In fact, as General Counsel's contentions in the *Gonzalez* case indicate, there is no logical basis in the Board's theory for distinguishing picketing at segregated gates from picketing at common gates. It is the Board's theory, here affirmed by the court below, that a direct approach to employees of neutral employers, no matter what the circumstances, is proscribed. Under this theory, there is no basis for distinguishing between inducements aimed at employees of neutral contractors coming to a primary employer's premises and those aimed at drivers and other employees of customers, suppliers, and transporters, coming to the employer's premises in the course of their employment on either a casual or regular basis. The logical and inevitable application of this interpretation of Section 8(b)(4) is a ban against all appeals at a struck employer's premises not narrowly limited to, and directed at, the employees of the struck employer. Such an interpretation, if permitted to stand, will severely restrict the right to strike guaranteed by Section 13 of the Act, as construed by this Court in the *Rice Milling* case. Such a restriction has impact upon every strike which may be conducted henceforth.

Even if the Board does not accept the logical extension of the doctrine sought in the *Gonzalez* case, it is a simple

[3] *United Packinghouse Workers (Wilson & Co. Inc.)* Case No. 17-CC-110, released Feb. 23, 1960; *Union De Trabajadores (Gonzalez Chemical Industries, Inc.)* Cases Nos. 24-CC-64, 24-CB-329, 24-CB-330, released Nov. 25, 1959.

matter for any employer to establish separate entrances for employees of neutral employers coming to a struck plant and thereby to negate the traditional rights of workers to ask fellow workers to support their strike.[4]

The importance of the issue raised in this case is further indicated by the fact that the Board's decision below represents a now admitted reversal of the Board's previous interpretation of Section 8(b)(4) which had been the view of the Board since the passage of the 1947 amendments to the Act. That interpretation appeared in the Board's decision in *United Electrical Workers (Ryan Construction Co.)*, 85 NLRB 417, cited by the Court in its *Rice Milling* decision, and based on facts strikingly similar to those in the instant case. While the Board's decision below was silent as to the *Ryan Construction* decision, in the subsequent *Virginia-Carolina Corp.* case, *supra*, the Board agreed with the Trial Examiner in that case that *Ryan Construction* was inconsistent with the instant case and overruled it to the extent of its inconsistency. The reversal of a long standing interpretation of the Act in this area critically affecting the right to strike warrants careful scrutiny and Supreme Court review.

---

[4] The difficulty with the logic of its 8(b)(4) decisions pertaining to appeals to employees of neutral employers not to enter struck premises is evidenced by the Board's decision in *Chauffeurs Local No. 200 (Milwaukee Plywood Company)*, 126 NLRB No. 80. In that case the Board dismissed a complaint charging that Local 200 violated Section 8(b)(4) by advising its members to honor a picket line established by a sister local in connection with a primary dispute. A majority of the Board panel pointedly declined to rely on earlier Board decisions in *Interborough News Company*, 90 NLRB 2135, and *The Pure Oil Company*, 84 NLRB 315, which held that appeals to employees of neutral employers not to perform services at a primary employer's premises constitute traditional primary strike action. Indeed, the Board cited no precedent for its decision and made no effort to reconcile it with its decision in the instant case. It is unclear from the Board's decision what rationale it has adopted, and it would appear impossible to provide a rationale, in terms of the provisions of the Act, which logically distinguishes it from the Board's decision in the instant case.

Finally, the issue in this case raises a further important question of statutory interpretation implicit in the Board's decision. Under its prior interpretation of Section 8(b)(4) in similar situations, the Board had never found it necessary to pass upon the impact of the proviso to Section 8 (b)(4) which reads:

> "Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . ."

As the Trial Examiner in this case observed, there is an obvious incongruity between the position adopted by the Board in this case and this proviso. Cf. *Interborough News Co.*, 90 NLRB 2135, 2146-9; *Teamsters, Local 87 (DiGiorgio Wine Company)*, 87 NLRB 720, 746. (J.A. 36.) This proviso was unchanged by the 1959 amendments to the Act. Its interpretation is of vital significance to the rights of employees under the Act and deserves full consideration at this stage of the administration of the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted tha the petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN C. SIGAL,
EDMOND F. ROVNER,
DAVID S. DAVIDSON,
1126 16th Street, N. W.,
Washington 6, D. C.

Attorneys for Petitioner

HERBERT L. SEGAL,
403 Republic Building,
Louisville, Kentucky,

Of Counsel

AUGUST, 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15205

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
GENERAL ELECTRIC COMPANY, INTERVENOR

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board

Decided April 18, 1960

Mr. Benjamin C. Sigal, with whom *Mr. David S. Davidson* was on the brief, for petitioner.

Mr. Melvin J. Welles, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Mr. Gerard D. Reilly for intervenor.

Before PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER and DANAHER, *Circuit Judges*.

DANAHER, *Circuit Judge*: Respective counsel for Petitioner (Union) and the Respondent (Board) stipulated that the sole issue may be stated thus:

> "Whether, under the circumstances of this case, the Board properly concluded that petitioner by *picketing* Gate 3A of the General Electric 'Appliance Park' plant at a time when General Electric was engaged in a

labor dispute with the petitioner violated section 8(b)(4)(A) of the National Labor Relations Act, as amended."[1]

The Union has asked us to review and set aside, and the Board asks enforcement of, its order that the Union cease and desist from inducing or encouraging the employees of certain named contractors "or any other employer, except General Electric Company" to engage in a strike or a concerted refusal in the course of their employment to perform certain work or services where an object is to force or require such employers "or any other employer or person, to cease doing business with General Electric Company."

Intervenor, General Electric (Company) maintains a manufacturing plant at Appliance Park, Louisville, Kentucky, where it produces automatic washers, driers, dish washers and other household appliances. The Company during 1957 shipped in interstate commerce finished products valued in excess of $10 million. Some 13 plant buildings are located on a 1,000 acre tract, substantially square, with about 6,600 feet to the side. Surrounding the area is a ditch of such width and depth that vehicles can enter and leave the premises only on five roadways across culverts. At the entrance and on either side of each roadway are metal stanchions, between which a chain may be fastened to block the movement of vehicles during night hours and on non-working days. These entranceways numbered 2, 3, 3A, 4 and 5, are herein called "gates." To various classes of vehicles the Company's plant protection department, years before the events here critical, had issued stickers of varying size, shape and color. Each vehicle, whether that of a Company employee, or an employee of a contractor, a supplier or the like could readily be identified by the plant guards simply by examination of the type of sticker carried on the windshield. Employees of the Company had been authorized to use Gates 2, 3, 4 and 5, but *not* Gate 3A.

The Union in July 1958 called a lawful strike against

[1] 61 Stat. 141 (1947).

the Company. At that time the Company had some 10,500 employees at Appliance Park, of whom substantially more than one-half (possibly 7,600) were production and maintenance employees for whom the Union had been certified as bargaining representative. Picketing immediately commenced at all gates, *including* Gate 3A. The picketing was peaceful, the pickets carrying signs reading:

LOCAL 761
ON STRIKE
G.E. UNFAIR

The Company kept the plants open, and it was found that more than 2,000 employees represented by the Union continued to work during the strike as did many others not within the bargaining unit.

The Company at that time had outstanding various contracts with some 12 employers. Their jobs included installation, repair and alteration of equipment, converting machinery for products changeovers, retooling, rearrangement of conveyors, installation of presses and the like. Some employers were constructing a truck dock, erecting an air shelter, and laying in a mezzanine floor in one of the plant buildings. General maintenance work beyond the skills or the available manpower of the Company personnel engaged for that purpose was also let to outside contractors. Some of the work in the various collateral lines had been the subject of such contracts over a period of years.

In earlier experience, some 22 jurisdictional disputes among the craft union employees of the various contractors had resulted in picket lines at gates normally used by the Company employees, thus keeping out the General Electric employees as well as those of the contractors. By 1954, the Company had issued written instructions to its plant security people that use of Gate 3A was to be limited to the independent contractors and their employees, in order to eliminate interference with access by Company employees. Likewise, all contractors and their employees had been instructed to enter and to leave the Company premises only through Gate 3A. Thus, the Company had established Gate 3A for the sole and separate use of

the contractors and their employees at a point some 550 feet from the next nearest gate.

For some years signs at Gate 3A had carried posted notices of the limitation on permitted use, and at least since January, 1958, a large sign erected there had read:

GATE 3-A
FOR EMPLOYEES
OF CONTRACTORS
— ONLY —
G.E. EMPLOYEES
USE OTHER GATES

The trial examiner's discussion of the case, he said, was "based upon the premise that Gate 3-A was reserved exclusively for contractors, their employees and suppliers, and that the Respondent [Union], in picketing at that Gate, did not seek to solicit any of the Company's employees to cease work." Also he concluded that while the Union's appeal at Gate 3A was to secondary employees only, i.e., to employees of persons other than General Electric, the Union picketing there was part of "traditional primary strike action," and hence was for the same lawful object as the picketing at the other four gates. He recommended that the unfair labor practice complaint be dismissed, having concluded that section 8(b)(4)(A) does not protect the business of a neutral employer within the situs of a primary dispute.

The Board substantially adopted the findings of the trial examiner, but disapproved his opinion that the picketing at Gate 3A was "traditional" and was protected by the Act.

The Board found from the record as a whole that only the neutral contractors' employees were permitted to use Gate 3A as the Union was well aware. The Board concluded that the Union's object in picketing at Gate 3A was to "enmesh these employees of the neutral employers in its dispute with the Company. Such purpose is shown not only by the picketing at gate 3-A but also by the oral appeals to the employees of neutrals not to cross the picket line." The Board therefore based its order on its conclusion that: "the Respondent violated Section 8(b)(4)(A)

of the Act by inducing and encouraging the employees of independent contractors to engage in a concerted refusal to work with an object of forcing the independent contractors to cease doing business with the Company."

We think the Board has correctly evaluated the findings of the trial examiner as well as its own. In any of these secondary boycott situations the ultimate determination turns upon the union's *objective*. Often "The line is fine,"[2] and circumstances of the particular case must supply the answer to which way the chips are to fall. Here the question may be stated: was it an object of the strike to induce or encourage the employees of the several contractors—not of the primary employer—to engage in concerted refusal in the course of their employment to perform their own work or to render services so that their employers would cease doing business with General Electric?

In the *Seafarers* case now relied upon by the Union, we considered such questions and found the union's exercise of its section 13[3] rights was not in violation of section 8(b)(4)(A). There, however, the pickets (1) identified themselves specifically as striking only their primary employer, (2) proclaimed by signs clearly showing that they had no dispute with the secondary employer, (3) distributed leaflets which explained in detail not only their own purpose and the reason picketing was conducted at the particular location, but especially excluded the secondary employer and its employees. Moreover the primary employer had placed its ship in the secondary employer's yards and only thereafter were its employees withdrawn; the ship had no other berth at which the union's organizational efforts might be publicized; and the vessel normally was at sea, months on end, with its crew shifts rotated and transported back and forth by helicopter. The operations as conducted by the primary employer not only had precluded the possibility of picketing the ship directly, but as evidence of the employer's purpose, the primary employer during the night placed a crew aboard the vessel and towed

[2] Seafarers International Union, Etc. v. NLRB, 105 U.S. App.D.C. 211, 216, 265 F. 2d 585, 590 (1959).

[3] 61 STAT. 151 (1947), 29 U.S.C. § 163 (1958).

it away. Such circumstances and such conduct, we concluded, made it clear that the union intended—not to shut down the neutral's operations, but to conduct lawful strike activities against the primary employer for the achievement of a protected objective.

The situation here is vastly different. When the strike was called in July 1958, the Union picketed all gates, including 3A. "Most, if not all, of the independent contractors' employees refused to cross the picket line, and did not work during the strike," the Board found. Pickets at Gate 3A in some cases refused neutral employees permission to get their tools. Others were told to get passes at the Union office. Others were told, in effect, to "Go on home." There was no showing that Company employees made any attempt to utilize Gate 3A. We need not detail additional items.[4] It is sufficient to note that the Board's findings do not lack support in substantial evidence on the record considered as a whole, and we are bound by those findings.[5]

This was no case of a union's seeking "to influence two employees of a customer of the mill not to cross the picket line."[6] Rather, the Board reasonably could find, as it did find, that the Union by peaceful picketing to be sure, but effectively nonetheless, sought to encourage the employees of the independent contractors to engage in a concerted refusal to perform any services for their employers in the course of their employment and thus to force their employers to cease doing business with the Company.[7]

---

[4] One Company employee testified that he had been permitted by a guard to enter that gate on one occasion after January, 1958. No others were shown to have done so. It fairly may be concluded that Company employees all but exclusively entered the premises at gates reserved for them. On the other hand, numerous employees of many independent contractors for years had been using only Gate 3A.

[5] Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 493 (1951).

[6] Labor Board v. Denver Bldg. Council, 341 U.S. 675, 687 (1951), interpreting the situation in Labor Board v. Rice Milling Co., 341 U.S. 665 (1951).

[7] Electrical Workers v. Labor Board, 341 U.S. 694, 701 (1951); Labor Board v. Denver Bldg. Council, 341 U.S. 675, 689 (1951); Retail Fruit & Veg. Clerks U. v. NLRB, 249 F. 2d 591, 599 (9 Cir. 1957); cf. Truck Drivers & Helpers v. NLRB, 101 U.S.App.D.C. 420, 249, F. 2d 512 (1957), *cert. denied*, 355 U.S. 958 (1958).

The objective of the picketing at Gate 3A as so found by the Board brings this case within the statute's range.[8] The "fine" line must be drawn in favor of the Board's order.

The order of the Board will be enforced.

[8] And see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113, 1114 (1960). Section 707, 73 STAT. 546, makes it clear that the 1959 Act has no applicability to the situation here.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1959.

No. 15,205

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,
GENERAL ELECTRIC COMPANY, INTERVENOR.

Filed April 18, 1960. Joseph W. Stewart, Clerk.

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER and DANAHER, *Circuit Judges*.

ORDER

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered by this court that the order of the National Labor Relations Board on review in this case shall be enforced.

Pursant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Circuit Judge Danaher.

Dated: April 18, 1960.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,205

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

GENERAL ELECTRIC COMPANY, INTERVENOR.

DECREE

Before: PRETTYMAN, *Chief Judge*; and WILBUR K. MILLER and DANAHER, *Circuit Judges*.

THIS CAUSE came on to be heard upon the petition of Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO to review and set aside an order of the National Labor Relations Board issued against Petitioner herein, its officers, representatives, agents, successors, and assigns on June 8, 1959, and upon the Board's answer and request for enforcement of said order. The Court heard argument of respective counsel on February 16, 1960, and has considered the briefs and the transcript of record filed in this cause. On April 18, 1960, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court, that the said order of the National Labor Relations Board be and the same is hereby enforced; and that said Petitioner, Local

761, International Union of Electrical, Radio and Machine Workers, AFL-CIO, its officers, representatives, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

s/ E. BARRETT PRETTYMAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

s/ WILBUR K. MILLER,
Judge, United States Court of Appeals for the District of Columbia Circuit.

s/ JOHN A. DANAHER,
Judge, United States Court of Appeals for the District of Columbia Circuit.

Dated May 18, 1960.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended, Act of June 23, 1947, c. 120, 61 Stat. 136-162, 29 USC § 151 *et. seq.* provide as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

"Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents : . .

"(4)(A) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter; . . .

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

(1570-1)

E COPY.

FILED
SEP
JAMES F.

No. 321

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

HERMAN I. BRANSE,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
A. The Board's findings	3
B. The Board's conclusions and order	6
C. The decision of the Court of Appeals	6
Argument	7
Conclusion	11

CITATIONS

Cases:

Interborough News Co., 90 NLRB 2135	10
International Brotherhood of Electrical Workers v. *National Labor Relations Board*, 341 U.S. 694	7
Local 618, Automotive Employees Union v. *National Labor Relations Board*, 249 F. 2d 332	10
National Labor Relations Board v. *Denver Building Trades Council*, 341 U.S. 675	7, 8, 9
National Labor Relations Board v. *International Rice Milling Co.*, 341 U.S. 665	7, 9
National Labor Relations Board v. *Local Union No. 55*, 218 F.2d 226	7
Retail Fruit and Vegetable Clerks Union v. *National Labor Relations Board*, 249 F.2d 591	8

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), Section 8 (b) (4) (A)	2, 6, 7, 8, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 321

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19-25) is reported at 278 F. 2d 282. The decision and order of the Board (J.A. 37-46)[1] are reported at 123 NLRB 1547.

[1] References are to the portion of the record printed as a Joint Appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decree of the court below was entered on May 18, 1960 (Pet. 27-28). The petition for a writ of certiorari was filed August 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) and (f) of the National Labor Relations Act (61 Stat. 146, 29 U.S.C. 160 (e) and (f)).

QUESTION PRESENTED

Whether the Board properly concluded on this record that, by picketing the premises of an employer with which it was engaged in a labor dispute at an entrance reserved exclusively for independent contractors and their employees who were working on the premises, the union intended to induce those employees to engage in a concerted refusal to perform services with an object of forcing a cessation of business between their employers and the primary employer, in violation of Section 8(b)(4)(A) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act in effect during the events of this case are set forth at pp. 29-30 of the Petition.[2]

---

[2] Unless otherwise specified, Section 8(b)(4)(A) refers to the provision as it read prior to the 1959 amendments to the Act.

STATEMENT

A. The Board's findings

The General Electric Company is engaged in the manufacture of household appliances at its plant known as "Appliance Park," located about ten miles from Louisville, Kentucky (J.A. 38; 51, 57). The operation requires retooling and revamping of the manufacturing facilities for model changes as well as considerable maintenance, installation, repair and alteration work of various types (J.A. 13, 14, 38; 55-57). Because its maintenance division lacked either the necessary skills or sufficient manpower to perform these diversified functions, the company contracted with local concerns for the needed services (J.A. 38; 55, 56).

On July 27, 1958, when the strike against the company described *infra* started, agreements were outstanding with twelve independent contractors. Six of them had already commenced work on such major projects as construction of a mezzanine floor on a building, a truck dock, and an air shelter, and rearranging a conveyor line (J.A. 39; 121, 122, 127-130, 131). Some of the contractors had maintained business relations with the company for a period of years, one, for example, for five or six years with a force that varied from one to fifty men. At the time of the strike some of the contractors' employees had been at the plant a year or more (J.A. 39; 80-81, 90, 100-104).

A large ditch surrounds the company's property so that access to the plant by vehicular traffic is limited

to five roadways across culverts which are designated as "gates" and are numbered 2, 3, 3-A, 4 and 5 (J.A. 13, 36, 38; 51, 52, 65, 170-171). Rules of the company required its employees to use gates 2, 3, 4 and 5 but not gate 3-A, and limited the independent contractors, their employees, and suppliers to entry at gate 3-A (J.A. 17, 39, 40, 42; 51, 52, 54-55, 69-70, 72, 100, 103, 107, 113, 118-119, 187-188; 189). Over a period of years, jurisdictional and other labor disputes had resulted in numerous strikes at the plant, in which employees of the independent contractors had participated. By restricting the use of gate 3-A to such employees and prohibiting the company's personnel from using that entrance, the company sought to minimize the impact of the picketing at the other entrances on the neutral employees (J.A. 39; 66-67, 179-181). In January, 1958, a sign was posted at gate 3-A which read as follows:

GATE 3-A
FOR EMPLOYEES
OF CONTRACTORS
—ONLY—
G.E. EMPLOYEES
USE OTHER GATES

Similar signs have been posted at that entrance since 1953 (J.A. 40; 52-53, 170-171).

Moreover, written instructions were issued to the plant guards on January 20, 1954, limiting that entrance to independent contractors and their employees (J.A. 39; 59, 179-187). Unless recognized by the guards, passengers in a vehicle entering gate 3-A

were required to identify themselves as contractor personnel, and a check was made against registration cards maintained at the guardhouse for this purpose (J.A. 40; 69, 71, 73-74, 114-115). A person applying at the wrong gate was obliged to turn back and seek admission at the correct gate (J.A. 40; 52, 55, 71, 107, 109-110).

On July 27, 1958, petitioner union called a strike of the company's own employees, and pickets were stationed at all entrances to the plant including gate 3-A (J.A. 13, 38, 41; 49, 61, 133). The pickets carried signs reading (J.A. 41; 49, 132-134, 170-171):

LOCAL 761
ON STRIKE
G.E. UNFAIR

In addition to the picketing, oral appeals were made to the employees of the independent contractors not to cross the picket line (J.A. 41). Employees of one company seeking to enter at gate 3-A in order to report to work were told to "go home" (J.A. 41; 105-106). The driver of the car pointed to his contractor's identification sticker but the pickets "didn't ask me anything, shook their heads, and that was all" (J.A. 78). When employees of another contractor attempted to enter at gate 3-A, they were told by a picket they could not go in (J.A. 96-97). In order to get their tools, they were required to obtain a pass at the union hall (J.A. 97-99). Because officials of a third contractor feared its contract would be cancelled unless work was continued, conferences were held with representatives of the petitioner in an en-

deavor to obtain permission for its employees to complete the project. Permission was not given and the employees of this contractor refused to resume work until conclusion of the strike (J.A. 87-89, 90-94).

Most, if not all, of the employees of independent contractors respected the picket line at gate 3-A (J.A. 17, 41; 63, 87, 89, 94, 132). Picketing at that entrance was discontinued August 9, 1958, pursuant to a temporary restraining order issued by a federal district court. The next day the strike was called off and all picketing ceased (J.A. 41; 49, 133, 134).

B. The Board's conclusions and order

On these facts, the Board concluded that the petitioners' picketing at gate 3-A, which was known to be restricted to the use of the employees of the independent contractors working on the premises, was designed to induce concerted work stoppages by the employees of those neutral employers and thus to force the independent contractors to cease doing business with the company. Accordingly, the Board held that the picketing at gate 3-A was not legitimate primary activity, but rather secondary activity proscribed by Section 8(b)(4)(A) of the Act. The petitioner was ordered to cease and desist from the unfair labor practices found and to post appropriate notices. (J.A. 42-43.)

C. The decision of the Court of Appeals

The Court of Appeals held that, on this record, the Board was warranted in concluding that the picketing at gate 3-A violated Section 8(b)(4)(A) of the Act.

The court therefore enforced the Board's order in full. (Pet. 19-25.)

ARGUMENT

The decision below is correct, does not conflict with that of any other court of appeals, and presents no issue warranting review by this Court.

1. Section 8(b)(4)(A) of the Act has "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. 675, 692. The section was not intended to proscribe so-called primary picketing, even though it has the incidental effect of inducing employees of secondary employers to cease work. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665. Where the primary employer and neutral employers are working at the same premises, the fundamental issue is whether the picketing was confined, as nearly as practicable, to the primary employer and his employees, or whether it was aimed at the secondary employer and his employees. If the former, the picketing is legitimate primary activity; if the latter, it is for an object proscribed by Section 8(b)(4)(A).[3]

---

[3] See *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694; *National Labor Relations Board* v. *Local Union*

On the record here, the court below was correct in sustaining the Board finding that the union's picketing at gate 3-A was for an illegal, secondary object. Although the premises were owned by the company, the independent contractors were engaged in regular and long-term projects there and, accordingly, were entitled to be shielded at that work place "from pressures in controversies not their own" (*Denver Building Trades Council, supra*). Instead of minimizing the impact of the picketing on the neutrals and their employees, the union went out of its way to enmesh them in its dispute with the primary employer. Although its picket lines at the other gates afforded an adequate opportunity to further its primary strike, the union deliberately extended the picketing to gate 3-A, which was used only by the employees of the neutral contractors. Moreover, by direct appeals to those employees at that gate, the pickets left no room for doubt that the picketing there was aimed at the contractors and their employees. In these circumstances, the Board was amply justified in concluding that the picketing at gate 3-A exceeded the bounds of legitimate primary activity, and fell under the ban of Section 8(b)(4)(A) of the Act.

No. 55, 218 F. 2d 226 (C.A. 10); *Retail Fruit and Vegetable Clerks Union* v. *National Labor Relations Board*, 249 F. 2d 591 (C.A. 9).

The 1959 amendments to the Act do not contradict the foregoing analysis, but, indeed, specifically recognize the primary-secondary distinction by providing that "nothing contained in this clause (B) [which contains the old Section 8(b)(4)(A)] shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing" (Pet. 13).

2. Contrary to the petitioner's contention (Pet. 7-9), the decision below is not in conflict with *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665. In that case, this Court held that Section 8(b)(4)(A) did not proscribe picketing at the primary employer's plant, and appeals by the pickets, which had the effect of inducing the driver of a truck to discontinue a pending trip to the plant. The Court, noting that Section 8(b)(4)(A) banned only the inducement of concerted employee action, concluded that a "union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees" (341 U.S. at 671)). It added that Congress, by Section 8(b)(4)(A), did not seek to interfere with the ordinary strike, and the conduct which occurred "was no more than traditional and permissible in a primary strike" (*National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. at 687). The situation here is clearly distinguishable in that the neutral employees did not just "happen to approach the picketed place of business", but rather the picketed premises was their regular work place as well as that of the primary employees. Accordingly, though here, as in *Rice Milling*, the picketing was confined to premises owned by the primary employer, this factor is not dispositive of its legality. As *Rice Milling* itself points out, the "limitation of the complaint to an incident in the geographically restricted area near the mill is sig-

nificant, although not necessarily conclusive" (341 U.S. at 671).[4]

Similarly, the situation here is distinguishable from that in *Local 618, Automotive Employees Union* v. *National Labor Relations Board*, 249 F. 2d 332 (C.A. 8) (Pet. 10-11). There, as here, the union picketed the primary employer's premises at a time when the employees of secondary employers were at work there. However, unlike here, there was nothing in the union's conduct which indicated an intent to enmesh the secondary employer and his employees in the dispute, other than the fact that the union continued to picket even after the primary employees had temporarily been removed from the premises. On the basis of this fact alone, the Board concluded that lawful primary picketing had been converted into illegal secondary activity, and thus banned all picketing at the primary premises. The Eighth Circuit's holding that the temporary removal of the primary employees

---

[4] Nor is a different conclusion required by the so-called picketing proviso to Section 8(b)(4), cited by the petitioner (Pet. 17). Although this proviso has not as yet been specifically construed by the Board (but see the report of the Trial Examiner in *Interborough News Co.*, 90 NLRB 2135, 2146-2149) its decision here is an implicit holding that the proviso is inapplicable. Thus the proviso, at best, merely permits a refusal to cross a primary picket line. If, as the petitioner implies, the mere fact that the primary employer is on the premises is sufficient to bring into play the protection of the proviso, all of the cases in which violations of Section 8(b)(4)(A) have been sustained with respect to picketing occurring at premises occupied jointly by the primary employer and neutral employers (see n. 3, *supra*) would be thrown into question. Since, as we have shown, the picketing at gate 3-A was properly found to be secondary and not primary, the proviso would not privilege it.

was not sufficient to destroy the primary character of the picketing does not preclude a contrary conclusion where, as here, the Union, although afforded an adequate opportunity to engage in primary picketing at other gates on the premises, deliberately extended its picketing to a gate used only by neutral employees.

3. That several cases involving separate plant gates have arisen, does not, as the petitioner suggests (Pet. 14-15), add to the importance of the present decision. The circumstances of the picketing and of the establishment of the separate gate in those cases are not the same as those in this case, and accordingly they turn on their own facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

HERMAN I. BRANSE,
Attorney,
National Labor Relations Board.

September 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 563501 250

LE COPY

Office-Supreme Court, U.S.
FILED
SEP 9 1960
JAMES R. BROWNING, Clerk

No. 321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

GENERAL ELECTRIC COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT GENERAL ELECTRIC COMPANY IN OPPOSITION

GERARD D. REILLY,
1120 Tower Building
Washington 5, D. C.
Attorney for General Electric Company

REILLY AND WELLS
1120 Tower Building
Washington 5, D. C.
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 321

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

GENERAL ELECTRIC COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT GENERAL ELECTRIC COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 19-25) is reported at 278 F. 2d 282. The decision and order of the National Labor Relations Board (J.A. 37-46)[1] are reported at 123 NLRB 1547.

[1] References are to the portion of the record printed as a Joint Appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decree of the court below was entered on May 18, 1960 (Pet. 27-28). The petition for a writ of certiorari was filed August 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 160 (e) and (f)).

STANDING OF GENERAL ELECTRIC COMPANY

The Complaint upon which the decision and order of the National Labor Relations Board (J.A. 37-46) were based was issued pursuant to a charge filed by General Electric Company under Section 10(b) of the National Labor Relations Act, as amended. The Company, which participated as charging party in the formal proceedings before the Board, moved for leave to intervene in the Court of Appeals. Its motion was granted by the Court in a per curiam order dated October 8, 1959.

STATEMENT OF THE CASE

In its brief in opposition the Board has adequately stated the "Question Presented" and correctly summarized the Board's findings, conclusions and order.

One incident referred to only briefly in the Board's "Statement" clearly establishes that the "object" of Petitioner's picket line at Gate 3-A was proscribed by Section 8(b)(4)(A) of the Act by demonstrating that Petitioner deliberately intended that the placing of pickets at this entrance would induce employees of the neutral contractors to refuse in concert to continue working at the Company's property.

The manager of Service Erection & Machine Company, one of the neutral contractors whose crew had

not crossed the picket line, being disturbed by the possibility of contract cancellation, arranged with the business agent of the union to which his employees belonged for a conference with the striking union (J.A. 92). The contractor sought permission for his men to enter the grounds. He was told (J.A. 92-95) by the recording secretary of the striking union that the contractor should "appreciate that we have a picket line up over there" (J.A. 92). On the following day the contractor, accompanied by the business agent for his employees' union, and the Commissioner of Industrial relations for the State of Kentucky, approached the striking union to discuss the admittance of contractor employees. They were told by Petitioner's vice president on this occasion that he had no authority to extend such workers privileges to enter the grounds, that he would take it up wih his executive board (J.A. 93-94), and get in touch with the contractor's union representative. Nothing resulted from this conference and the contractor's working force did not return until after the pickets were removed (J.A. 94).

ARGUMENT

The Respondent agrees with the Board in representing to this Court that the decision below is correct, does not conflict with that of any other court of appeals, and no issue of such importance as to justify review by this Court is presented. It is also significant that in the 1959 amendments to the Act, the construction of which is not in issue here, Congress impliedly ratified the limitations on situs picketing illustrated by the Board order in this case.

The real test of whether a picket line at the premises of a primary employer is lawful or whether it is pro-

hibited by Section 8(b)(4)(A) turns not on the matter of situs but upon the object of the picketing. Thus no exception to the approach of the court below to the central issue can be taken (Pet. 23):

> "Here the question may be stated: was it an object of the strike to induce or encourage the employees of the several contractors—not of the primary employer—to engage in concerted refusal in the course of their employment to perform their own work or to render services so that their employers would cease doing business with General Electric?"

Inasmuch as Gate 3-A was the entrance regularly used by the employees of neutrals and not used at all by employees of the primary employer, it can scarcely be argued that the efforts of the Union in this case were not directed at bringing about a concerted work stoppage with respect to the neutral contractors, an objective prohibited by 8(b)(4)(A).

1. But the Union, apparently conceding that the picketing was aimed at employees of secondary employers, nonetheless contends that its conduct at Gate 3-A "cannot be distinguished in any material respect from the inducement of the employees of neutral employers in the *Rice Milling*[2] case" (Pet. 8) and is thereby protected activity. In *Rice Milling*, however, where the Court's review was confined to the single incident of the inducement of a truck driver and his helper not to pick up an order at the picketed plant this Court limited its holding to the following:

> "A sufficient answer to this claimed violation of the section is that the Union's picketing and its

[2] *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665.

> encouragement of the men on the truck did not amount to such an inducement or encouragement to "concerted" activity as the section proscribes."

Such holding, we submit, is totally inapplicable to a situation where, as here, there is a readily discernible pattern of conduct aimed at all employees of a group of neutral contractors.

Equally unjustifiable is the Union's contention that this Court in *Rice Milling* gave implicit recognition to the legitimacy of all picketing at primary sites. Quite to the contrary, we suggest that this Court's decision disavowed the notion that the presence of a primary situs immunized picketing which, had it occurred elsewhere, would be violative of 8(b)(4)(A). The Board, in its opinion in *International Rice Milling Co.*, 84 NLRB 360, 361, dismissed the original complaint on the ground that

> "The Respondent's activities arose out of the *primary* picketing of the Kaplan Mill and were carried out in the immediate vicinity of this mill." (Original emphasis.)

Likewise the only issue before the Court of Appeals for the Fifth Circuit[3] was whether the Board was correct in holding that because "only primary picketing" was involved, Section 8(b)(4)(A) had not been violated. The Court rejected this contention, saying:

> "To allow the Board to rule such activity as prohibited by the statute not to be a violation thereof, simply because it occurred in the vicinity of the struck employer's plant, would render the section ineffective and insufficient."

---

[3] *International Rice Milling Co.* v. *N.L.R.B.*, 183 F. 2d 21, 26.

Although the holdings of the Board and the Court of Appeals rested precisely on the significance of picketing at a primary situs, this Court chose to base its own decision on grounds not referred to by either forum. By holding that the inducements were not aimed at *concerted* activity, this Court studiously avoided adopting the position pressed upon it by the Board and here taken by the Petitioner. In short, the Petitioner's concept of legitimate primary activity has simply not been accepted by this Court in the *Rice Milling* case or any other decision.

2. In similar vein, the instant case is readily distinguishable from *Local 618, Automotive Employees Union* v. *N.L.R.B.*, 249 F. 2d 332 (CA 8), relied upon by Petitioner to establish a conflict of decision between the Courts of Appeals of the Eighth Circuit and the District of Columbia.

Indeed, the Court below specifically distinguished a parallel decision in its own circuit from the instant case while Petitioner has cited it as controlling precedent. That decision was *Seafarers International Union* v. *N.L.R.B.*, 265 F. 2d 585 (CADC). In *Seafarers* and in *Local 618*, the unions engaged in a primary strike, placing picket lines near the place of employment of the strikers—in the first case, a ship tied to a dock in a repair yard; in the second, a filling station. After the pickets had appeared, the primary employers in both instances instructed their own employees not to report to work. The picketing continued, however, resulting in certain repair and construction jobs at both places being interrupted. In each case the reviewing courts declined to enforce a Board order because of absence of evidence that an object of

picketing at the particular place was to induce the employees of neutrals to stop work—it being conceded that the original establishment of the picket line in each instance was a legitimate incident of the primary strike.

In its opinion in this case, the Court below (Pet. 23-24) points out how different the object of the picketing in the instant case was from that in *Seafarers*. Such observation could have been made with equal force with respect to the facts in the *Local 618* case, had the instant case arisen in the Eighth Circuit. In both cases the courts in holding that the Board's finding concerning the objective of the pickets was lacking in evidentiary support, stressed the inability of the striking unions to find any other place to picket, either for the purpose of maintaining the primary strikes or to publicize the disputes to the general public.

It is obvious in the instant case, however, that the availability of the other four gates at General Electric to Union pickets afforded Petitioner all the opportunity it needed to appeal to the employees of the struck employer and to proclaim the existence of its strike to the general public. Consequently, the decision of the Eighth Circuit in *Local 618* is no more in conflict with the decision of the Court below than the latter Court's own earlier opinion in *Seafarers*. Plainly, neither case is in point here.

3. We do not understand the Union's petition to contend that the 1959 amendments to the Act grant greater immunity to union conduct with respect to 8(b)(4) activity than was previously the case. Indeed such amendments were probably intended to be more stringent in curbing union activity. That is not a question

which this Court is called upon to decide however, for Section 707 of the Landrum-Griffin Act specifically provides that none of its provisions create an unfair labor practice retroactively.

This case arose prior to the 1959 amendments and was decided by the Board on June 8, 1959—several months before the new legislation went into effect. It is interesting to note, however, that the legislative history of the proviso respecting primary strikes and primary picketing (Pet. 12-13), far from lending support to Petitioner's thesis, indicates Congressional approval of such Board and court decisions (including this one) as had established the line of demarcation between permissible and prohibited picketing at the situs of a dispute. The Statement of the House Conference Managers explains the intent of this proviso as follows:

> "The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not *eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law.* (Emphasis supplied.) See, for example, *N.L.R.B. v. Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); *Brotherhood of Painters, Decorators, and Paper Hangers, etc.*, and *Pittsburgh Plate Glass Co.* (110 NLRB 455 (1954)); *Moore Drydock Co.* (81 NLRB 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 (1953)).

4. In sum, the nature of Petitioner's conduct dispels all doubt that its objective was to embroil the employees of secondary employers in its primary dispute with

General Electric. Not only the presence of the picket line at the segregated gate, but also incidents such as the appeal of Petitioner's vice-president to the business agent of the union representing employees of one of the contractors (J.A. 92-95), offer compelling support for the view of the Court of Appeals that the Union induced concerted action to shut down the neutrals' operations. Accordingly the lower court's holding that "the objective of the picketing at Gate 3-A as so found by the Board brings this case within the statute's range" is correct.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

GERARD D. REILLY,
1120 Tower Building
Washington 5, D. C.
Attorney for General Electric Company

REILLY AND WELIS
1120 Tower Building
Washington 5, D. C.
Of Counsel

September, 1960

ILE COPY

Office Supreme Court, U.S.
FILED
JAN 10 1961
JAMES R. BROWNING, Clerk

No. 321

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

AND

GENERAL ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

BENJAMIN C. SIGAL,
EDMOND F. ROYNER,
DAVID S. DAVIDSON,
1126 16th Street, N.W.,
Washington 6, D. C.

MOZART G. RATNER,
1411 K Street, N.W.,
Washington 5, D. C.

Attorneys for Petitioner.

HERBERT L. SEGAL,
403 Republic Building,
Louisville, Kentucky,

Of Counsel

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Question Presented	5
Statement of the Case	5
A. The Facts	5
B. Trial Examiner's Findings and Conclusions	9
C. Board's Conclusions and Order	10
D. Decision of the Court Below	10
Summary of Argument	11
Argument	20
The Issue Defined	20
I. The Board's Initial Approach Properly Effectuated the Intention of Congress to Protect Traditional Primary Strike Action	22
A. Congress Intended to Outlaw in Section 8 (b)(4)(A) Only Those Strikes and Inducements to Strike Which Were Familiar to It as "Secondary Boycotts"	22
B. Congress Intended to Preserve With the Right to Strike the Traditional Primary Pressure Which Is Essential to Effective Strike Action	29
1. The Traditional Object of Primary Picketing Is to Evoke a Sympathetic Boycott of the Primary Employer at the Situs of the Dispute	30
2. The Sympathetic Primary Boycott is Essential to Effective Strike Pressure	36
C. The Act Preserves the Right to Induce Neutral Employees to Engage in a Sympathetic Primary Boycott	37

Page

D. To Effectuate the Dual Objectives of Congress, the Language of Section 8 (b)(4)(A) Must Be Read as Applying Only to Secondary Strikes, Both Total and Partial, and Their Inducement 39

E. The Board's Initial Approach Correctly Conceived and Properly Applied the Primary-Secondary Distinction 46

1. Cases in Which the Only Services Which Employees of Neutral Employers Perform at the Situs of Dispute Involve the Primary Employer 50

2. Cases in Which Employees of Neutral Employers Perform Some Services at the Situs of the Dispute Which Involve the Primary Employer and Other Services Which Do Not 53

3. Cases in Which Services Performed by the Employees of One or More Neutral Employers at the Situs of the Dispute Do Not Involve the Primary Employer 57

4. The Appropriate Function, Under the Board's Initial Approach, of a Separate Gate or Entrance to Plant Premises for the Exclusive Use of Independent Contractors 61

F. In the Quartet of "Secondary Boycott" Cases Decided on June 4, 1951, This Court Found That the Board's Construction and Application of the Primary-Secondary Distinction Conformed With Congress' Dual Objectives 63

1. The Holding That the Conduct of the Pickets Directed Toward the Neutral Employees Constituted Primary, Not Secondary, Action 64

Page

2. The Findings in *Denver* and *Langer* That the Strike Action Was Directed Against Neutral Employers 67
3. Application of the "An Object" Test to Secondary Strike Action and Its Inducement 69

G. *Rice Milling* Is Not Distinguishable From the case at bar 70

II. The Board's New Approach Defeats the Intention of Congress to Protect Traditional Primary Strike Action 76

A. In the Board's New View, Lawful Primary Pressure Is Only That Exerted Through the Primary Employer's Own Employees 77

B. Restriction of Lawful Pressure to That Exerted Through the Primary Employer's Own Employees Severely Curtails Primary Picketing 83

1. Proscription of Primary Picketing Where the Primary Employer Temporarily Removes His Employees From the Situs 83
2. Proscription of Primary Picketing at Places Where Picketing Is Not "Necessary" to Enable the Union to Appeal to the Employees of the Primary Employer Who Are Involved in the Dispute 86
3. Proscription of Primary Picketing at a Separate Gate to the Primary Premises and at a Common Entrance not in Current Use by Primary Employees 89

C. The Board's Rationale Is Untenable 91

1. The "Title to Property" Straw Man 91
2. Distinction in Terms of the Duration of the Neutral Employer's Presence at the Situs Is Without Justification 98

Page

D. The Board Has Usurped the Function of Congress 100

Conclusion 103

Authorities Cited

Cases:

Allen Bradley Co. v. *Local Union No. 3, I. B. E. W.*, 325 U.S. 797 28

Alpert v. *United Steelworkers of America, Etc.*, D. C. Mass., 141 F. Supp. 447 84

Amalgamated Meat Cutters (Swift & Co.), 113 NLRB 275, enf'd. as mod. 237 F. 2d 20, cert. den. 352 U.S. 1015 79

American Federation of Labor v. *Swing*, 312 U.S. 321 36

Atomic Projects & Production Workers (Associated General Contractors of America), 120 NLRB 400, enf'd. *sub nom. Office Employees Int'l. Union* v. *N.L.R.B.*, 105 U.S. App. D.C. 13, 262 F. 2d 931 18, 92

Bedford Co. v. *Stone Cutters Assn.*, 274 U.S. 37 26

Blandford v. *Duthie*, 147 Md. 388, 128 Atl. 138 27

Bossert v. *Dhuy*, 221 N.Y. 342, 117 N.E. 582 26

Boyd v. *Dodge*, 217 Ark. 919, 234 S.W. 2d 204 33

Brewery & Beverage Drivers, Local 67 (Washington Coca-Cola), 107 NLRB 299, enf'd. 95 U.S. App. D.C. 117, 220 F. 2d 380 87

Carlson v. *California*, 310 U.S. 106 31

Chauffeurs, Teamsters, Warehousemen & Helpers (Hoosier Petroleum Company, Inc.), 106 NLRB 629, enf'd. 7 Cir., 212 F. 2d 216 59

Cohn & Roth Electric Co. v. *Bricklayers' etc., Local Union No. 1*, 92 Conn. 161, 101 Atl. 659 27

Colgate-Palmolive Peet Co. v. *N.L.R.B.*, 338 U.S. 355 19, 102

Consolidated Realty Co. v. *Dyers, Etc.*, 137 N.J. Eq. 413, 45 A. 2d 132 32

Deena Artware, Inc., 86 NLRB 732, enf'd., 6 Cir., 198 F. 2d 645, cert. den. 345 U.S. 906 98

Page

DiGiorgio Fruit Corp. v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 191 F. 2d 642, cert. den. 542 U.S. 869, enf'g. *Teamsters, Local 87 (DiGiorgio Wine Co.)*, 87 NLRB 720 36, 38, 42, 65, 72

Douds v. *International Longshoremen's Assn.*, 2 Cir., 224 F. 2d 455, cert. den. 350 U.S. 873 36, 40, 41

Douds v. *Metropolitan Federation of Architects, Etc.*, S.D. N.Y., 75 F. Supp. 672 37, 40, 41, 48

Drivers Union v. *Meadowmoor Co.*, 312 U.S. 287 30

Duplex Co. v. *Deering*, 254 U.S. 443 26

Exchange Bakery v. *Rifkin*, 245 N.Y. 260, 157 N.E. 130 30

Ex parte Henry, 147 Tex. 315, 215 S.W. 2d 588 33

Gill Engraving Co. v. *Doerr*, S.D. N.Y., 214 Fed. 111 26

Goldfinger v. *Feintuch*, 276 N.Y. 281, 11 N.E. 2d 910 26

Grant Construction Co. v. *St: Paul Building Trades Council*, 136 Minn. 167, 161 N.W. 520 27

Gray v. *Building Trades Council*, 91 Minn. 171, 97 N.W. 663 27

Gruet Motor Car Co. v. *Briner*, 229 S.W. 2d 259 (Mo. App.) 32

International Brotherhood of Boilermakers (Richfield Oil Corp.), 95 NLRB 1191 59

International Brotherhood of Electrical Workers, Local Union No. 134 v. *Western Union Co.*, 7 Cir., 6 F. 2d 444 27

International Brotherhood of Electrical Workers v. *N.L.R.B.*, 341 U.S. 694, aff'g. 181 F. 2d 34 (2 Cir.) 15, 63, 76

International Brotherhood of Teamsters (Alexander Warehouse & Sales Co.), 128 NLRB No. 105 81

International Brotherhood of Teamsters (Ready Mixed Concrete Company), 116 NLRB 461 79, 87, 88

International Brotherhood of Teamsters (Sterling Beverages, Inc.), 90 NLRB 401 55

International Brotherhood of Teamsters (Schultz Refrigerated Service), 87 NLRB 502, 31, 37, 39, 47, 54, 76

Page

Jetton-Dekle Lumber Co. v. *Mather*, 53 Fla. 969, 43 So. 590 27

Lehigh Structural Steel Co. v. *Atlantic Smelting & Refining Works*, 92 N.J. Eq. 131, 111 Atl. 376 27

Local No. 36, International Chemical Workers Union (Virginia-Carolina Chemical Corp.), 126 NLRB No. 117 ..... 21, 90

Local 74, United Brotherhood of Carpenters v. *N.L.R.B.*, 341 U.S. 707 63

Local 175, Teamsters (McJunkin Corporation), 128 NLRB No. 57 82

Local 618, Etc. v. *N.L.R.B.*, 8 Cir. 249 F. 2d 332, setting aside *Local 618, Automotive Employees Union (Incorporated Oil Co.)*, 116 NLRB 1844, ... 16, 32, 71, 76, 77, 83

Local 657, Teamsters (Southwestern Motor Transport, Inc.), 115 NLRB 981 ..... 16, 77, 79, 88

Local 760, International Brotherhood of Electrical Workers (Roane-Anderson Co.), 82 NLRB 696 59

Local 1796, United Brotherhood of Carpenters, Etc. (Montgomery Fair Co.), 82 NLRB 211 58

Local 1976, Carpenters Union v. *N.L.R.B.*, 357 U.S. 93 ..... 40, 42, 43, 44, 47

Loewe v. *Lawlor*, 208 U.S. 274 26

Metal Polishers, Buffers, Platers and Helpers (Climax Machinery Company), 86 NLRB 1243 48

Milwaukee Plywood Company v. *N.L.R.B.*, 7 Cir., No. 12, 911 Decided December 20, 1960, 47 LRRM 2291, aff'g. *International Brotherhood of Teamsters (Milwaukee Plywood Company)*, 126 NLRB No. 80 ..... 42, 45, 72, 81

Missouri Pac. R. Co. v. *United Brick & Clay Workers' Union*, 218 Ark. 707, 238 S. W. 2d 945 34

Newspaper and Mail Deliverers' Union (Interborough News Company), 90 NLRB 2135 ..... 36, 38, 53

N.L.R.B. v. *Associated Musicians*, 2 Cir., 226 F. 2d 900, cert. den. 351 U.S. 962 ..... 43, 98

N.L.R.B. v. *Dallas General Drivers, Etc., Local No. 745*, 5 Cir., 264 F. 2d 642, cert. den. 361 U.S. 814 43

Page

N.L.R.B. v. Denver Bldg. and Construction Trades Council, 341 U.S. 675, aff'g., *Denver Building & Construction Trades Council (Gould and Preisner)*, 82 NLRB 1195 11, 15, 21, 47, 59, 63, 70

N.L.R.B. v. Drivers, Local Union 639, 362 U.S. 274, 16, 39, 100, 102

N.L.R.B v. General Drivers, Local 968, 5 Cir., 225 F. 2d 205, cert. den. 350 U.S. 914, setting aside *General Drivers, Local 968 (Otis Massey Co.)*, 109 NLRB 275 18, 86, 101

N.L.R.B. v. Insurance Agents International Union, 361 U.S. 477 19, 101

N.L.R.B. v. International Rice Milling Co., 341 U.S. 665, reversing 183 F. 2d 21 (5 Cir.) and aff'g. 84 NLRB 360 11, 15, 21, 38, 63, 70

N.L.R.B. v. International Brotherhood of Teamsters, Local 294, 2 Cir., — F. 2d —, decided Nov. 10, 1960, 47 LRRM 2085 18, 88, 89

N.L.R.B. v. International Union of United Brewery, Etc. Workers, 10 Cir., 272 F. 2d 817 18, 72, 89

N.L.R.B. v. Knitgood Workers Union, Local 155, 2 Cir., 267 F. 2d 916 43

N.L.R.B. v. Laundry, Etc. Drivers, Local No. 928, 9 Cir., 262 F. 2d 617 43

N.L.R.B. v. Local 11, Etc., 6 Cir., 242 F. 2d 932 71

N.L.R.B. v. Local Union No. 55, 10 Cir., 218 F. 2d 226, enf'g. *Local Union No. 55 and Carpenters' District Council (Professional and Business Men's Life Insurance Company)*, 108 NLRB 363 95, 101

N.L.R.B. v. Peter C. K. Swiss Chocblate Co., 2 Cir., 130 F. 2d 503 37

N.L.R.B. v. Rockaway News Co., 345 U.S. 71 38

N.L.R.B. v. Service Trade Chauffeurs, Etc., 2 Cir., 191 F. 2d 65 37, 43, 72, 100

N.L.R.B. v. Truck Drivers Local Union, No. 449, 353 U.S. 87 100

Northwestern Pacific Railroad Co. v. Lumber & Sawmill Workers' Union, 31 Cal. 2d 441, 189 P. 2d 277 32

Page

Oil Workers International Union, Local Union 346 (The Pure Oil Company), 84 NLRB 315, 31, 36, 39, 42, 44, 52

Pickett v. *Walsh*, 192 Mass. 572, 78 N.E. 753 27

Pierce v. *Stableman's Union*, 156 Cal. 70, 103 Pac. 324 27

Piezonki v. *N.L.R.B.*, 4 Cir., 219 F. 2d 879 72

Printing Specialties and Paper Converters Union (Sealright Pacific Ltd.), 82 NLRB 271 48

Rabouin v. *N.L.R.B.*, 2 Cir., 195 F. 2d 906 44

Retail Fruit & Veg. Clerks U. v. *N.L.R.B.*, 9 Cir., 249 F. 2d 591, enf'g. *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market)*, 116 NLRB 856, 15, 21, 80, 93

Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547 13, 30, 54, 56, 73, 95

Sales Drivers, Helpers, Etc., Local 859 v. *N.L.R.B.*, 97 U.S. App. D.C. 173, 229 F. 2d 514, cert. den. 351 U.S. 972, reversing *Sales Drivers, Local 859 (Campbell Coal Company)*, 110 NLRB 2192 18, 89

Schatte v. *International Alliance of Theatrical Stage Employees*, 9 Cir., 182 F. 2d 158, cert. den. 340 U.S. 827 44

Schivera v. *Long Island Lighting Co.*, 296 N.Y. 26, 69 N.E. 2d 233 32

Seafarers International Union, Etc. v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 265 F. 2d 585, setting aside *Seafarers International Union, Etc. (Salt Dome Production Co.)*, 119 NLRB 1638, 17, 35, 41, 45, 47, 60, 72, 84, 101

Snow Iron Works, Inc. v. *Chadwick*, 227 Mass. 382, 116 N.E. 801 27

Thornhill v. *Alabama*, 310 U.S. 88 31

Unión de Trabajadores (Gonzales Chemical Industries), 128 NLRB No. 116 82, 91

United Association of Journeymen, Etc. (Columbia-Southern Chemical Corp.), 110 NLRB 206 60

United Brick & Clay Workers v. *Deena Artware*, 6 Cir., 198 F. 2d 637, cert. den. 344 U.S. 897 18, 70, 97

Page

United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Company, Inc.), 81 NLRB 802, enf'd. 10 Cir., 184 F. 2d 60, cert. den. 341 U.S. 947 ..... 46, 47, 70

United Electrical & Machine Workers (Ryan Construction Corporation), 85 NLRB 417 ..... 13, 21, 30

United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 39

United Steelworkers of America (Phelps Dodge Refining Corporation), 126 NLRB No. 168 90

Wright v. *Teamsters Local Union 690*, 33 Wash. 2d 905, 207 P. 2d 662 32

Statutes:

National Labor Relations Act, as amended in 1947 (61 Stat. 136, 29 U.S.C. § 151, et seq.):

Sec. 2(3) 2, 11, 37
Sec. 7 ..... 2, 11, 37
Sec. 8(b)(4)(A) 3, 11, 37
Sec. 13 ..... 3, 11, 38

National Labor Relations Act, as amended, Sept. 14, 1959, Pub. Law 86-257, 73 Stat. 519, 29 U.S.C. § 151 et seq.:

Sec. 8(b)(4)(B) 4, 46

Legislative Materials:

Senate Report No. 105, 80th Cong., 1st Sess. pp. 7, 8, 22, 54, 1 Legislative History of the Labor-Management Relations Act, 1947, (G.P.O. 1948), pp. 413, 414, 428, 460 ..... 22, 27

House Conference Report No. 510, 80th Cong., 1st Sess., p. 43, 1 Leg. Hist. 547 22

House Report No. 1147, 86th Cong., 1st Sess., p. 38, 1 Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O., 1959) p. 942 ..... 46, 73

H. Doc. No. 334, Labor-Management Relations Act, 1947—Veto Message, 93 Daily Cong. Rec. 7500, June 20, 1947, 1 Leg. Hist. 915 25

Page

93 Cong. Rec. 3835, 3838, 4131, 4138, 4196-4197, 4198-4199, 4837-4838, 4844-4845, 4858, 4859, 4865, 5005, 5011, 6445-6446, 7537, A. 2252; 2 Leg. Hist. 1005-1006, 1012, 1055, 1068, 1104-1105, 1106-1109, 1354-1355, 1364, 1365, 1366-1368, 1370-71, 1372-73, 1383, 1479, 1491, 1544, 1654, 1524 22

105 Daily Cong. Rec. A. 4308, May 21, 1959, A. 8464, Sept. 30, 1959, II Leg. Hist. L.M.R.D. & A. 1750 (1), 1841 (3) 44

105 Daily Cong. Rec. 13092, July 27, 1959, II Leg. Hist. L.M.R. & D.A. 1523 44

105 Daily Cong. Rec. 15221, August 20, 1959, II Leg. Hist. L.M.R. & D.A. 1707 73

105 Daily Cong. Rec. 16415, September 3, 1959, II Leg. Hist. L.M.R. & D.A., 1433 44, 73

Miscellaneous:

Barnard & Graham, Labor and the Secondary Boycott, 15 Wash. L. Rev. 137 (1940) 32

Frankfurter & Greene, The Labor Injunction, (Macmillan Co., 1930) 34

Oakes, Organized Labor and Industrial Conflicts (1927), Sec. 408 34

Restatement, Torts, Volume IV, Chapter 38, Topic 3, pp. 138-139; Sec. 779, Comment f, pp. 109-110 31

Teller, Labor Disputes and Collective Bargaining (Baker, Voorhis & Co., 1940), Vol. 1 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 321

OCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

AND

GENERAL ELECTRIC COMPANY

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court below (R. 194-200) is reported 278 F.2d 282, 107 U.S. App. D.C. 402. The Decision nd Order of the Board (R. 37-46) are reported at 123 LRB 1547.

JURISDICTION

The decision and order of the court below (R. 194,200) ere entered on April 18, 1960, and its decree (R. 201), on ay 18, 1960. On July 8, 1960, by order of Mr. Justice

Black, the time for filing the Petition for Writ of Certiorari herein was extended to August 16, 1960 (R. 205). The Petition for Writ of Certiorari was filed on August 12, 1960, and was granted on October 24, 1960 (R. 206). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and Section 10 (e) and (f) of the National Labor Relations Act, as amended. (61 Stat. 146, 29 U.S.C. 160 (e) and (f))

STATUTES INVOLVED

This case is governed by the National Labor Relations Act, as amended, sometimes referred to herein as the Act, Act of June 23, 1947, c. 120, 61 Stat. 136-162, 29 USC § 151 et seq., as it appeared prior to its 1959 amendment.

The relevant provisions of the Act are:

"Sec. 2. When used in this Act— * * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as

a condition of employment as authorized in section 8(a)(3).

"Sec. 8(b). It shall be unfair labor practice for a labor organization or its agents— * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter; * * *

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

In 1959, the provisions of Section 8 (b)(4)(A) were amended (Public Law 86-257, 1959, Section 704 (a), 73 Stat.

541, 29 U.S.C. § 158), and now appear as follows insofar as pertinent to this case:

"Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents— * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing: * * *

"*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or

approved by a representative of such employees whom such employer is required to recognize under this Act: * * *"

QUESTION PRESENTED

Whether a striking union violated Section 8(b)(4)(A) of the Act by picketing with signs publicizing its dispute with the struck employer at a gate to that employer's manufacturing plant which he had reserved for the exclusive use of his independent contractors and their employees who were performing work on his plant premises which was beneficial to the struck employer.

STATEMENT OF THE CASE

A. The Facts

On August 4, 1958, General Electric Company, hereinafter sometimes called GE, filed a charge alleging that Petitioner violated Section 8 (b)(4)(A) of the Act by picketing Gate 3-A at its Appliance Park, Kentucky plant, where Petitioner was on strike (R. 1). On August 6, 1958, a complaint was issued by Respondent's Regional Director for the Ninth Region (R. 4). On September 22 and 23, 1958, a hearing was held before the Trial Examiner. The Board's decision was rendered on June 8, 1959. All statements of fact recited below were either found by the Board directly or were findings of the Trial Examiner adopted by the Board, or are uncontradicted on the record.[1]

Petitioner has been, at all times material, the collective bargaining agent for the production and maintenance employees at General Electric Company's Appliance Park, Kentucky installation (R. 38; 49). Appliance Park is com-

[1] References to the record preceding a semicolon are to the findings of the Board or the Trial Examiner; succeeding references are to supporting evidence.

posed of 13 buildings, located on a 1000 acre tract (R. 38; 51). Six of the 13 buildings are used directly for manufacturing and the other buildings augment this function (R. 14; 51). At the time of the events herein, there were approximately 10,500 people employed by GE in Appliance Park, about 7600 of whom were in the collective bargaining unit (R. 38; 61).

Appliance Park is located about 10 miles from Louisville, Kentucky and the overwhelming majority of the employees drive to work by private car (R. 38; 57). Access to Appliance Park by automobile can be achieved through any one of five gates (R. 38; 52). Once a car enters any of these gates, there is no impediment to movement between buildings (R. 64-65, 115).

One of the five gates to Appliance Park, all of which were picketed, is designated Gate 3-A (R. 38; 49). This gate had been assigned by General Electric in 1954 for the use of employees of independent contractors who do work for GE in Appliance Park (R. 39-40). GE asked the contractors to have their employees use Gate 3-A because it hoped that, in the event of a strike of the employees of any of the contractors, the union on strike would restrict picketing to this gate and not picket the other gates at Appliance Park (and thereby impede General Electric's employees from using the other gates) (R. 39; 66, 117, 179). A sign was placed over the gate which read (R. 40; 140, 170):

"Gate 3-A
FOR EMPLOYEES
OF CONTRACTORS
—ONLY—
G.E. EMPLOYEES
USE OTHER GATES"

Instructions were given to plant guards to direct General Electric Company employees who might appear at Gate 3-A to use other gates.[2]

On July 27, 1958, employees represented by Petitioner instituted a lawful economic strike based on 24 unresolved grievances (R. 41; 49, 50).[3]

At the outset of the strike and through its entire course, i.e., from July 27, 1958 to August 10, 1958, GE made public solicitations to its employees to go through Petitioner's picket lines to work (R. 135). Approximately 2000 of the 7600 employees in Petitioner's bargaining unit did, in fact, go through the picket lines and perform work during the strike (R. 18, 41; 63, 117). In addition, some of the contractor's employees went through the picket line and performed work (R. 41; 75, 116).

The Company's counsel stated that "the Company indicated that the plant was open, that anyone who had business to perform or work to do at the plant was welcome at the plant." The Company sought not only to induce its employees to work during the strike but sought also "otherwise to transact the plant's business during the strike." (R. 137).

On the morning the strike started, pickets were stationed

---

[2] The guards were employed and supervised by GE (R. 68-69, 165-166). GE production and maintenance employees were not informed that these instructions were given (R. 58-60). The Company did not offer to restrict Gate 3-A to contractors' employees during the strike nor did it take any steps to insure such restrictive use of the gate (R. 20; 134-136). There is evidence that several Company employees had used Gate 3-A for ingress and egress but the degree to which GE employees used this gate prior to the strike is not material to this proceeding (R. 146, 150, 152, 155).

[3] There is no issue in the proceeding as to the authorization or legality of the strike.

at all five gates leading to Appliance Park (R. 41; 49, 50). The pickets at all the gates carried similar signs which read (R. 41; 133-134):

"Local 761
ON STRIKE
GE UNFAIR"

Neither the signs, nor statements made by the pickets or Petitioner's representatives, indicated that the strike was directed against any employer other than GE. There is no evidence that Petitioner, or any of its representatives, approached the unions which represented the contractors' employees to solicit cooperation in causing a cessation of work at Appliance Park or at any other location. Contacts between Pefitioner and the contractors' employees occurred as the contractors' employees individually, or in one instance in a group of three, approached the gates of Appliance Park. In a few instances, contractors' employees and supervisors appeared on their own initiative at Petitioner's headquarters. (R. 41; 78, 79, 85, 87, 88, 97, 98).

The independent contractors were engaged to perform maintenance and construction work, in many instances identical to the work which GE employees could, and did, perform (R. 15-16; 56, 62, 84-85, 130, 147). The majority of the work done by the independent contractors' employees was performed in the manufacturing buildings where Petitioner's members normally work (R. 16; 62-63, 99, 111, 122, 128, 131-132). Some of the work to be done by the contractors was work for which estimates were received both from the GE maintenance division in Appliance Park and from outside contractors, and for which the outside contractors submitted a lower bid (R. 15; 124-125, 130). In one instance, the GE maintenance division had been given the assignment but lacked sufficient personnel

to complete the work, and an outside contractor was given the assignment (R. 15; 203-205).[4]

Most of the employees of the independent contractors declined to work at Appliance Park during the strike (R. 18, 41; 85-87). Some of them asked Petitioner for passes to go through the picket line to secure personal tools which had been left in the plant. Such passes were issued on request. (R. 18; 82-83, 97, 109-110). Many of the contractors' employees who did not cross the picket line at Appliance Park during the strike were dispatched by the contractors to other projects on which each contractor was then working (R. 78, 83). None was asked to refuse to perform work for his employer at any location other than at the General Electric Appliance Park plant.

Picketing at Gate 3-A was enjoined by decree of the Federal District Court on August 9, 1958, pursuant to Section 10 (l) of the Act, and was stopped on that date (R. 41; 134).

B. Trial Examiner's Findings and Conclusions

The Trial Examiner found that Appliance Park was not a "common situs" occupied by both GE and its contractors, and that GE does not "share its premises" with the contractors (R. 21-22). He found that Gate 3-A was merely an access to the site of the primary labor dispute, and consequently regardless of whether it was customarily used exclusively for the independent contractors and their employees, Petitioner had a right to picket the gate. He found further that the object of the picketing was to halt the operations of the struck plant by appeals directed collectively (a)

---

[4] The subcontracting of work to the independent contractors was not a cause of or an issue in the strike.

to the Company's employees at gates 2, 3 4 and 5, (b) to the consuming public at all gates, (c) to secondary employees who were engaged in transporting raw materials and finished products and who used gates 3 and 4, and (d) to the contractors' employees at Gate 3-A. He found that there was no intent to induce or encourage the secondary employees to cease work at any place other than at Appliance Park. He concluded that appeals to secondary employees were "valid, primary activity with secondary effects" and that Petitioner had not violated Section 8 (b)(4)(A). (R. 35).

C. Board's Conclusions and Order

Without reversing the Trial Examiner's finding that there was no intent to induce or encourage the contractors' employees to cease work at any place other than at Appliance Park, the Board found that Petitioner's object in picketing Gate 3-A was "to enmesh these employees of the neutral employers in its dispute with" General Electric Company (R. 42). The Board concluded that Petitioner had "accordingly" violated Section 8 (b)(4)(A) and ordered that Petitioner cease and desist from such activity.

D. Decision of the Court Below

The court below granted enforcement of the Board's order and denied Petitioner's petition for review. The court held that the ultimate determination depended upon the objective of the Petitioner's activity at Gate 3-A. The court concluded that there was substantial evidence to support the conclusion that Petitioner's objective was to encourage the employees of the neutral employers to engage in concerted refusal to perform any services in the course of their own employment, and affirmed the Board's

conclusion that Petitioner's picketing at Gate 3-A violated Section 8 (b)(4). (R. 194-200).

SUMMARY OF ARGUMENT

I

The terms of the Act and the legislative history both show that Congress intended to preserve fully "the right of labor organizations to bring pressure to bear on offending employers" and to shield "unoffending employers and others" only against the pressure of "secondary boycotts," not against the pressure generated by traditional primary strike activities which neutrals who do business with the offending employer at the situs of the dispute inevitably feel. *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 672-674; *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 686-688, 692.

The legislative history shows that in prohibiting secondary boycotts Congress sought to prevent unions from exerting strike pressure on neutral employers through their own employees for the purpose of forcing such neutrals in turn to exert pressure on the primary employer, and to prevent the proliferation of labor disputes by restricting use of the traditional weapons of economic conflict to the area of the dispute with the primary employer.

However, Sections 2 (3), 7, 13, the proviso to Section 8 (b)(4), and the legislative history of the Act show equally that Congress did not intend to impair the right to strike or to use strike-related weapons traditionally regarded as "primary," rights indispensable to exertion of effective strike pressure on the offending employer, and hence to the system of free collective bargaining which it sought to maintain. To the contrary, it is clear that Congress intended to preserve and protect these rights. Peaceful picketing

for the purpose of inducing employees of neutral employers not to work for the primary employer behind the picket line, as well as to induce all other persons not to serve or patronize the primary employer, was universally considered primary and was so regarded by Congress. In Sections 2 (3) and 7, Congress protected the right of employees of neutral employers to assist strikers by concerted activity. The proviso to Section 8(b)(4) shows that Congress knew that such assistance would involve refusing to work behind a picket line at the primary employer's premises.

To effectuate the dual objectives of Congress,—the elimination of what it understood to be secondary boycotts and the protection of traditional primary activity—it is necessary to read the language of Section 8 (b)(4)(A) as if the word "secondary" appeared in the text before "strike" and before "concerted refusal." Otherwise, the language outlaws all strikes and all "concerted refusals," *i.e.*, partial strikes. Since Congress could not have intended this result, the language must be read in the light of the legislative history which shows that Congress intended to outlaw only "secondary boycotts." This construction is supported by the recent amendment of the Act in which Congress reaffirmed that Section 8 (b)(4)(A) should not be read so as to outlaw "any primary strike or primary picketing."

The Board's initial approach to Section 8 (b)(4)(A) sought to give effect to Congress' concern with secondary boycotts while preserving the right to exercise primary strike pressure.

Where picketing occurred at premises occupied by the primary employer to which employees of neutral employers came only to perform services involving or benefiting the primary employer, the question "against whom is the picketing directed" was quite simple of solution. Since the only work or services performed by employees of

terest"[9] that existed between the employees of the primary and of the secondary employer and the "unity of interest" between the primary and secondary employers themselves.[10] Courts which had adopted these concepts held primary and lawful some types of strike pressures which other courts held secondary and unlawful. Partial strikes of employees of neutral employers consisting of refusals, at places remote from the dispute, to handle material or products belonging to, coming from, or destined for a struck employer *i.e.*, "hot goods", were in this category. Cf. *Duplex Co.* v. *Deering*, 254 U.S. 443; *Bedford Co.* v. *Stone Cutters Assn.*, 274 U.S. 37; *Loewe* v. *Lawlor*, 208 U.S. 274; with *Bossert* v. *Dhuy*, 221 N.Y. 342, 117 N.E. 582; *Gill Engrav-*

---

[9] The "community of interest" concept was articulated by Mr. Justice Brandeis in his dissenting opinion in *Duplex Co.* v. *Deering*, 254 U. S. 443, 479. Senator Pepper quoted from that dissent in opposing Section 8 (b) (4) (A) on that ground. 93 Cong. Rec. 4197, 2 Leg. Hist., p. 1104.

[10] The "unity of interest" concept was phrased as follows by the New York Court of Appeals in *Goldfinger* v. *Feintuch*, 276 N. Y. 281, 286, 11 N. E. 2d 910, 913:

> "Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer but against a *nonunion product* sold by one in unity of interest with the manufacturer who is in the same business for profit. Where a manufacturer pays less than union wages, both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale, and this may result in unfair reduction of the wages of union members. Concededly the defendant union would be entitled to picket peacefully the plant of the manufacturer. Where the manufacturer disposes of the product through retailers in unity of interest with it, unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of bringing its plea to the attention of the public."

ing Co. v. *Doerr*, S.D.N.Y., 214 Fed. 111; *Pierce* v. *Stableman's Union*, 156 Cal. 70, 103 Pac. 324.[11]

A majority of Congress, however, considered such partial strikes unjustifiable. The Senate Report gave a concrete illustration of activity which proponents aimed to ban (S. Rep. No. 105, 80th Cong., 1st Sess., 22, 1 Leg. Hist. 428):

> "[It will be] an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the

---

[11] In the same category was strike action directed against a general contractor on a building project because he had engaged the services of a non-union subcontractor. Some courts held that to call a strike against a general contractor to compel him to get rid of such a subcontractor was not a "secondary boycott." *Gray* v. *Building Trades Council*, 91 Minn. 171, 97 N. W. 663; *Cohn & Roth Electric Co.* v. *Bricklayers', etc., Local Union No. 1*, 92 Conn. 161, 101 Atl. 659; *Grant Construction Co.* v. *St. Paul Building Trades Council*, 136 Minn. 167, 161 N. W. 520. The preponderant view was to the contrary. In *International Brotherhood of Electrical Workers, Local Union No. 134* v. *Western Union Co.*, 7 Cir., 6 F. 2d 444. 445, the court said:

> "The things that were done were not done because of any violation by the employer of any term of the contract of employment. They were not done to induce the payment of higher wages, better working conditions, or for any other lawful purpose. But they were done to compel their own perfectly satisfactory employers, or the owners of the premises where appellee was doing or desired to do its installation work, to injure and annoy appellee, and to cause such employers to violate contracts with appellee for the sole reason that appellee employed nonunion men."

Accord: *Pickett* v. *Walsh*, 192 Mass. 572, 78 N. E. 753; *Blandford* v. *Duthie*, 147 Md. 388, 128 Atl. 138; *Lehigh Structural Steel Co.* v. *Atlantic Smelting & Refining Works*, 92 N. J. Eq. 131; 111 Atl. 376; *Snow Iron Works, Inc.* v. *Chadwick*, 227 Mass. 382, 116 N. E. 801; *Jetton-Dekle Lumber Co.* v. *Mather*, 53 Fla. 969, 43 So. 590.

neutral employers at the picketed premises involved the primary employer, the inducement of such employees not to cross the picket line was clearly directed at the primary employer and was part of the pressure the union could lawfully bring to bear on the offending employer, regardless of its inevitable repercussion on the neutral employer. Thus, in *United Electrical and Machine Workers (Ryan Construction Corporation)*, 85 N.L.R.B. 417, 418, the Board held that picketing designed to induce employees of a neutral contractor to refrain from working on the primary employer's premises was primary "whether 1 or 100 employees [of the contractor] wish to enter."

Where, however, some or all of the work or service performed by employees of neutral employers at a "common situs" i.e., where, in addition to the primary employer, other employers were engaged in business, at least some of which did not involve the primary employer, a union's freedom to picket required restraint. In such cases, the Board sought to permit a striking union to appeal to neutral employees to refrain from such work and services as involved the primary employer, while at the same time prohibiting any unnecessary appeal to neutral employees to refrain from work or services not involving the primary employer. The Board required unions to picket only at times when the primary employer was engaged in business at the picketed situs; to picket as close to his business operation as feasible; and, to disclose clearly by their picket signs that their dispute was with the primary employer. *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547, 549. The Board recognized, however, that picketing of the primary employer at such a common situs could not be more severely restricted, for to do so would impair the union's Congressionally preserved right to bring pressure to bear on the primary employer.

Under the *Moore Dry Dock* approach, a separate or reserved gate can perform a legitimate function only where the neutral employees who use it perform no service for the primary employer. In such circumstances the neutral employees may not lawfully be subjected to picket line inducement, except insofar as such inducement is an unavoidable concomitant of primary picketing directed at those who are performing services involving the primary employer. It is therefore proper to isolate them and thereby avoid the incidental repercussions which occur when they pass through a common gate. Thus, it is perfectly proper for a factory owner to establish a reserved gate for the exclusive use of outside contractors to guard against incidental repercussions on his own employees of picketing in the event a union becomes involved in a dispute with one of the contractors. Since the factory owner is a neutral in such a dispute, and his employees perform no services for the contractors, they may appropriately be immunized from inducement. But the factory owner may not by the device of establishing a separate gate immunize contractors' employees who perform services for the factory owner at his factory against picketing directed against the factory owner when he is the offending employer in a labor dispute. In that case the intentional inducement of employees of neutral employers to withhold such services is an aspect of traditional primary picketing Congress intended to preserve. *United Electrical & Machine Workers (Ryan Construction Corporation), supra.*

In the quartet of secondary boycott cases decided June 4, 1951, this Court found the foregoing approach of the Board to be in "conformity with the dual congressional objectives * * *" (*N.L.R.B.* v. *Denver Bldg. & Construction Trades Council,* 341 U.S. 675, 692), and "expressed

IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3. (See testimony of R. S. Edwards, vol. 1, p. 176, et. seq.[12]; *Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.*, 325 U.S. 797.)"

The union attitude which forbade the use of material at the point of installation because of the character of its manufacture elsewhere, was summarized by Senator Taft to be: "We will not permit any material to come into New York City and be put into any building in New York City."[13] Each of the other illustrations of secondary activity cited by Senator Taft likewise pertained to creating a dispute at an independent employer's plant or place of business over the fact that the product there utilized or worked on was deemed objectionable by virtue of conditions which prevailed at the original place of its manufacture.[14] Thus, proponents of Section 8 (b) (4) (A) disagreed with the view that the interests of the employees involved in the primary dispute justified workers employed by other employers in assisting them by refusing, at places remote

---

[12] ". . . The boycott we are objecting to operates like this: The A. F. of L. International Brotherhood of Electrical Workers controls the labor that installs electrical construction materials of all kinds. This IBEW refuses to install and brings pressure on contractors and wholesalers to prevent them from handling any of these electrical construction materials unless they have been manufactured by IBEW labor *in the original plants.*" (Emphasis supplied.) 1 Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. 176-177. As explained by the Second Circuit during its consideration of the case, the labor weapon involved was "refusal to work upon disfavored goods." *Allen Bradley Co.* v. *Local Union No. 3*, 145 F. 2d 215, 219 (C.A. 2), reversed, 325 U. S. 797.

[13] 93 Cong. Rec. 4199, 2 Leg. Hist. 1107.

[14] 93 Cong. Rec. 3838, 4199, 2 Leg. Hist. 1012, 1107-1108.

approval of the Board's *Ryan* decision." *Retail Fruit & Veg. Clerks' U.* v. *N.L.R.B.*, 9 Cir., 249 F. 2d 591, 596. It repudiated the Fifth Circuit's rejection in *Rice Milling* of the distinction between primary and secondary action, and held that the intentional inducement of employees of a neutral employer to refrain from performing work or services beneficial to the primary employer at his premises was "no more than traditional and permissible in a primary strike." At the same time, it noted, whereas the locale of the inducement is not controlling, the nature of the action sought to be induced is. Thus, if the union had attempted to induce the employees of the neutral employer in *Rice Milling* to take concerted action "more widespread" than refusal to cross the primary picket line, its conduct would not have been immune. In *Denver* and in *Langer (International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694) this Court sustained the Board's conclusions that the unions' strike action was secondary because it was directed against neutral employers and not against the primary employers. The Court agreed with the Board that neither the relationship between contractor and subcontractor, nor the fact that they were engaged on a common project at the same location, justified the unions in treating the separate employers as one and the same. The opinions cannot fairly be read as implying that any strike action or picketing which has as "an object" disruption of business relations between two employers is *prima facie* unlawful. Nor can they be read as holding or implying that the action induced in *Rice Milling* was "permissible" only because it was not "concerted" in that it was engaged in only by two, rather than more, employees of the neutral employer.

rom the primary dispute, to handle or work on the primary employer's goods. They therefore rejected the contention hat such refusals should not be characterized and condemned as "secondary boycotts."

3. Congress Intended to Preserve With the Right to Strike the Traditional Primary Pressure Which is Essential to Effective Strike Action

The legislative history shows equally clearly that Congress did not intend, by outlawing secondary boycotts, to mpair in any degree the effectiveness of primary strike pressure. Thus, Senator Taft stressed (93 Cong. Rec. 3835, 2 Leg. Hist. 1007):

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. * * * So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."

In summing up the bill, which became the Act, upon its return from conference, Taft reiterated, (93 Cong. Rec. 6445-6446, 2 Leg. Hist. 1544):

> "The conferees rejected the broad prohibition of all kinds of strikes. * * * The only strikes which are de-

II

The Board's reversal of *Ryan* in this case is predicated upon a new approach to Section 8 (b)(4), under which the Board looks to the language of the Section read literally and ignores the legislative history for "the essence of the relevant proscription." *Local 618, Automotive Employees Union (Incorporated Oil Co.)*, 116 N.L.R.B. 1844, 1845. Doing this enables it to discard Congress' exemption of "traditional primary strike action" from the statutory ban and to substitute its own notion of what strike action should be held permissible.

The key to the Board's current concept is its assumption that the only pressure which a union is entitled to exert upon a primary employer is that which it can create through work stoppages of the primary employer's employees. *Local 657, Teamsters (Southwestern Motor Transport, Inc.)*, 115 N.L.R.B. 981, 983. That assumption stems from reading Section 13 narrowly as protecting only the right to cease work. *Local 618, Automotive Employees Union (Incorporated Oil Company)*, 116 N.L.R.B. 1844, 1847. It overlooks that "Picketing has been equated with striking for the purposes of § 13" (*N.L.R.B.* v. *Drivers Local Union 639*, 362 U.S. 274, 281, n. 9); it discards Sections 7, 2 (3), and the proviso to Section 8 (b)(4); and it "ignores elementary information as to traditional multiple purposes of primary picketing of which Congress must have been aware when it definitely protected primary picketing under the Act." *Local 618*, supra, 116 N.L.R.B., at 1855.

By thus restricting the allowable scope of economic pressure, the Board brushed aside Congress' judgment that only *secondary* pressures should be outlawed and all *primary* pressures should be retained, and thereby made room

clared to be illegal are secondary boycotts and jurisdictional strikes."

To do "nothing to outlaw" primary strikes was necessarily to preserve, not merely the right to cease work, but all of the traditional means by which strikers exert primary economic pressure on the employer. The most "traditional" of these is picketing at the employer's premises.

1. The Traditional Object of Primary Picketing is to Evoke a Sympathetic Boycott of the Primary Employer at the Situs of the Dispute.

The object of primary picketing never has been limited to inducing employees of the primary employer to strike and prospective replacements to refrain from taking the place of the strikers. Just as picketing is not a simple corollary of a strike in the sense that the right to picket does not depend on the existence of a strike,[15] so it is not a simple corollary of the strike in the sense that picketing, unlike striking, is not aimed only at the employer's labor supply. Picketing is a weapon of economic conflict designed to prevent the offending employer from carrying on his business during the labor dispute. "Peaceful picketing is the workingman's means of communication." *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287, 293. Pickets "stationed at the place of business involved in the dispute"

---

[15] "Picketing without a strike is no more unlawful than a strike without picketing." *Exchange Bakery* v. *Rifkin*, 245 N.Y. 260, 263, 157 N.E. 130, 132. "Picketing for organizational purposes or to call attention to unfair conditions—where all other attributes of primary action are present—has never been considered to attain a secondary character, simply because no strike, strikebreakers or replacements are to be found on the picketed premises." *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 567.

for exercise of its own judgment as to which incidents of primary picketing should be tolerated and which should not. From the new assumption as to the legitimate object of primary pressure, it followed that picketing and related inducement of employees of neutral employers is illegal unless it accompanies an appeal to the primary employer's employees, and, even if it does, a question remains whether it runs afoul of the express prohibition of Section 8 (b)(4)(A).

Under the guise of applying the *Moore Dry Dock* tests, the Board judged that new issue in terms of whether the impact of the picketing on *employees* of neutral employers was "inevitable and incidental" or intentional and avoidable. Thus, the *Moore Dry Dock* conditions, which were designed to confine intentional, avoidable inducement of employees of neutral employers to such of their work as involved the primary employer, now were used to outlaw avoidable, intentional inducements relating to that very work. The new approach thus rendered illegal precisely that conduct which the *Moore Dry Dock* standards were designed to preserve.

The Board's new approach prohibits primary picketing where the primary employer temporarily removes his employees from the situs; where the Board finds picketing "unnecessary" to enable the union "adequately" to appeal to the primary employer's employees; as well as where the primary employer provides a separate gate or entrance, or even separate identification, for employees of neutral employers who come to his premises to serve him during a strike. This approach, Courts of Appeals have recognized, is destructive of union rights which Congress protected. *Local 618, Etc.* v. *N.L.R.B.*, 8 Cir., 249 F. 2d 332; *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105

aim "at three points: first, at the employer's labor market; second, at his supply market, and third at his sales market." Restatement, Torts, Volume IV, Ch. 38, Topic 3, pp. 138-139; Sec. 779, Comment f, pp. 109-110. Their object is to maximize economic pressure on the primary employer by seeking "to dissuade workers and others from entering the plant for purposes of business or from otherwise doing business with the employer." *Ibid.*; *Oil Workers International Union, Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 318; *International Brotherhood of Teamsters, Etc. (Schultz Refrigerated Service)*, 87 N.L.R.B. 502, 504-505; *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547, 548.

When used in a primary strike, the purpose of picketing is "to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." *Thornhill* v. *Alabama*, 310 U.S. 88, 99. Everyone engaged in "publicizing the facts of a labor dispute" has "a purpose to persuade others not to buy merchandise *or perform services*." [Emphasis added.] *Carlson* v. *California*, 310 U.S. 106, 112. They intend to persuade all those reached by the message "to refrain from entering into advantageous relations with the business establishment which is the *scene of the dispute*." [Emphasis supplied.] *Thornhill* v. *Alabama*, 310 U.S. 88, 104.

What makes "the picket line * * * truly a formidable weapon" is its "appeal for solidarity" to other workers: "The reluctance of workers to cross a picket line is notorious." *Printing Specialties and Paper Converters Union* v. *LeBaron*, 9 Cir., 171 F. 2d 331, 334. The traditional function of primary picketing, therefore, is to appeal "to all union sympathizers," including employees of neutral

U.S. App. D.C. 211, 265 F. 2d 585; *N.L.R.B.* v. *General Drivers, Local 969*, 5 Cir., 225 F. 2d 205, cert. den. 350 U.S. 914; *Sales Drivers, Helpers, Etc., Local 859* v. *N.L.R.B.*, 97 U.S. App. D.C. 173, 229 F. 2d 514, cert. den. 351 U.S. 972; *N.L.R.B.* v. *International Union of United Brewery, Etc. Workers*, 10 Cir., 272 F. 2d 817; *N.L.R.B.* v. *International Brotherhood of Teamsters, Local 294*, 2 Cir., —F. 2d—, decided Nov. 10, 1960, 47 LRRM 2085.

The Board attempts to justify application of its new approach on the theory that otherwise legality of picketing in cases such as the case at bar would turn on "title to property." At no time did the Board's approach turn on "title to property." Its initial approach was aimed at eliminating at a situs of dispute the inducement of employees of neutral employers engaged in performing work unrelated to the primary employer, regardless of "title" to the premises. The very cases on which the Board relies as justifying its current approach are in accord with its initial approach. *Office Employes International Union* v. *N.L.R.B.*, 105 U.S. App. D.C. 13, 262 F. 2d 931; *Retail Fruit & Veg. Clerks U.* v. *N.L.R.B.*, 9 Cir., 249 F 2d 591; *N.L.R.B.* v. *Local Union No. 55*, 10 Cir., 218 F. 2d 226; cf. *United Brick & Clay Workers* v. *Deena Artware*, 6 Cir., 198 F. 2d 637, cert. den. 344 U.S. 897.

The Board also attempts to distinguish between inducement of neutral employees on the basis of the duration of their employer's presence at the primary employer's premises. This distinction appears to be designed to capitalize on the "happen to approach" language wrested out of its context in this Court's *Rice Milling* opinion. But if it is intended to distinguish between neutral employers in terms of the impact of inducement of their employees on the neutral employer's business, it is wide of the mark. A customer who distributes only one product—that of the

employers who patronize or serve the primary employer at the situs of the dispute, "not to cross the imaginary 'line'." *Local 618, Etc.* v. *N.L.R.B.*, 8 Cir., 249 F. 2d 332, 336.

Unlike the differences of opinion which had developed at common law and under some statutes as to whether other strike tactics were primary or secondary (pp. 26-27, *supra*), there was common understanding that picketing of a struck employer at his own place of business was primary action and that the response such picketing was designed to evoke was a primary, not a secondary boycott.[16] As two writers put it (Barnard and Graham, *Labor and the Secondary Boycott*, 15 Wash. L. Rev. 137, 141, 144 (1940)):

> "* * * in so far as purely peaceful picketing of *R's* [primary employer's] place of business by *E* [employees of primary employer] seeks to persuade customers (*C*) i.e., third parties (*T*), not to patronize *R* and other employees (*E*) not to work for *R*, such picketing contains at least the analytical elements of the 'secondary boycott' since *T* has effectively been brought into the picture. *It is, however, recognized that peaceful picketing of R by E has never been designated by the courts as a secondary boycott.* * * *
>
> * * * * * * *
>
> "* * * unquestioned recognition has now been accorded the legality of the peaceful picketing of *R* by

[16] E. g., *Schivera* v. *Long Island Lighting Co.*, 296 N. Y. 26, 69 N. E. 2d 233; *Gruet Motor Car Co.* v. *Briner*, 229 S. W. 2d 259 (Mo. App.); *Consolidated Realty Co.* v. *Dyers, etc. Federation*, 137 N. J. Eq. 413, 415-416, 45 A. 2d 132, 133-134; *Wright* v. *Teamsters Union Local*, 33 Wash. 2d 905, 913, 207 P. 2d 662, 666; *Northwestern Pacific Railroad Co.* v. *Lumber & Sawmill Workers' Union*, 31 Cal. 2d 441, 447-448, 189 P. 2d 277, 281.

struck employer—can be as severely injured by the refusal of his employees to pick up merchandise across a picket line at the primary employer's premises, conduct which the Board immunizes and protects, as a building contractor can be harmed by refusal of his employees to continue work on a struck employer's plant premises.

At bottom, however, the vice in the Board's approach is that it undertakes to reevaluate factors which were the elements of Congress' own policy judgment. What the Board did in *Moore Dry Dock*, and what this Court approved as being consistent with Congress' policy, was to refine the line of demarcation between exercise of the right of unions to strike and the right of neutral employers to be immune from secondary strike pressure. To the extent that the union directed its attack against the primary employer only, any repercussions on the neutral employer were treated as immaterial incidents of primary conduct.

Under the new approach, the Board draws a line of demarcation between what it considers effective strike pressure on the one hand, and the interest of neutrals in avoiding all repercussions of strike action on the other. That is not only a perversion of the *Moore Dry Dock* rules, but also a usurpation of Congress' province to determine where, in the area of economic conflict, the line between the permissible and the unlawful should be drawn. The Board is not permitted under "the guise of administration" to substitute its own policy for Congress' policy, "to put limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, 363. Just as the Board is not permitted under the "guise of determining good or bad faith in negotiations" to "regulate what economic weapons a party might summon to its aid," (*N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477, 490), so is it not

> *E*, albeit an objective is admittedly to influence *T* • • • [such cases are those] involving union activity *in geographical proximity to the employer's place of business.* • • •" [Emphasis added].

As another writer stated (1 Teller, *Labor Disputes and Collective Bargaining*, 456 (1940)):

> "It has never been suggested that pickets engaged in peaceful primary picketing may be said to be engaged in secondary picketing where, without picketing third parties, they seek whether through the distribution of literature or otherwise to enlist the support of third parties."

In *Ex parte Henry*, 147 Tex. 315, 326, 215 S.W. 2d 588, 595, the court said:

> "• • • it seems to be the position • • • that since the employees of the railways would not cross the picket line manned by [members of the striking union], the picketing *and the consequent refusal of the railway employees to serve the* [primary] *employer's plant* constitute such concerted action between [members of the striking union] and these employees as to amount to secondary picketing and boycotting • • • [P]icketing does not offend • • • *merely because third parties who come to the area of the dispute may prove sympathetic to one disputant rather than to the other.*" [Emphasis added.]

In *Bond* v. *Dodge*, 217 Ark. 919, 924, 234 S. W. 2d 204, 207, the court said:

> "A secondary boycott occurs when striking employees, in addition to picketing the premises of their own employer, also establish picket lines around the premises

permitted, under the guise of distinguishing between primary and secondary boycotts, to outlaw primary picketing because it believes the repercussions on neutral employers are too severe or "unnecessary."

ARGUMENT

The Issue Defined

The question underlying this case is whether it is a permissible object of primary picketing in a labor dispute to induce employees of customers, suppliers and others who perform services of benefit to the primary employer at his place of business to refrain during the labor dispute from rendering such services to him. If it is, then the judgment below must be reversed. For, despite the statement of the court below that by its peaceful picketing the union "sought to encourage the employees of the independent contractors to engage in a concerted refusal to perform *any* services for their employers" (R. 199-200, emphasis supplied), the evidence is unequivocal that the *only* services which the union sought to induce employees of the contractors not to perform were services directly involving General Electric's business at General Electric's plant, the situs of the labor dispute. The Trial Examiner explicitly so found (R. 35) and nowhere in its decision did the Board, or the court below in its discussion of the facts, take issue with that finding. Indeed, the evidence specifically shows that when, as a result of the picketing, the contractor's employees abandoned work on General Electric's projects at Appliance Park, they were directed by their employers to work, and without any hindrance from the union did work, elsewhere on projects for customers other than General Electric. (R. 78, 83).

If, on the other hand, the Board is empowered to declare that the only legitimate object of primary picketing at a

of others not so directly interested in the labor dispute, such as customers to whom the primary employer sells or manufacturers from whom he buys."

In *Missouri Pac. R. Co.* v. *United Brick & Clay Workers' Union*, 218 Ark. 707, 709, 710-711, 238 S. W. 2d 945, 946, 947, the court said:

> "This case differs from the average only in that the pickets patrol an isolated RR crossing instead of a sidewalk used by the general public. But the railroad track is a means of access to the Acme plant, and we think it immaterial that the one company alone habitually uses this entrance. • • •
>
> "If we assume, without deciding, that a secondary boycott is unlawful in Arkansas, we find no such boycott in the appellees' conduct. The picket line is maintained as close to Acme's plant as is possible without a trespass. • • • The fact that [a neutral employer] alone is affected is immaterial. *Like most picket lines this one has among its purposes that of discouraging outsiders from doing business with the strikers' former employer.* In its present location the picketing is primary and not secondary." [Emphasis supplied.]

This view was predicated upon the traditional concept of a "primary boycott" as being a "withholding of patronage and refusal to trade" with the offending party. Frankfurter & Greene, *The Labor Injunction*, (Macmillan Co., 1930), p. 43.[17] The Supreme Court had defined the secondary boycott in *Duplex Co.* v. *Deering*, 254 U.S. 443, 466 as:

---

[17] Accord: Oakes, *Organized Labor and Industrial Conflicts* (1927), Section 408.

manufacturing establishment is to induce employees and prospective employees of the primary employer to make common cause with the strikers or pickets, then the Board's outlawry of Petitioner's picketing at Gate 3-A may be sustained. The Petitioner has at all times freely admitted that its object in picketing at Gate 3-A was to appeal to employees of the contractors not to serve General Electric, the primary employer, behind the picket line. It has never maintained that its inducement of the contractors' employees by picketing there was merely an unavoidable consequence of picketing directed at and designed to reach GE's employees.

Under the Board's initial approach to Section 8 (b)(4)(A), picketing indistinguishable from the picketing here in issue was held lawful and protected. *United Electrical & Machine Workers (Ryan Construction Corporation)*, 85 N.L.R.B. 417. That approach was found by this Court to be in "conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Bldg. and Construction Trades Council*, 341 U.S. 675, 692. Indeed, in *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, 672-673, n. 6, this Court "expressed approval of the Board's Ryan decision. * * *" *Retail Fruit & Veg. Clerks' U. v. N.L.R.B.*, 9 Cir., 249 F. 2d 591, 596.

Nevertheless, the Board thereafter jettisoned this approach, and, as it has now admitted, *Local No. 36, International Chemical Workers Union (Virginia-Carolina Chem. Corp.)*, 126 N.L.R.B. No. 117, 45 LRRM 1407, its instant decision and *Ryan* cannot stand together. Unless the Board and this Court were wrong the first time, the judgment below must be reversed.

"* * * a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

That definition was "generally accepted". Teller, *Labor Disputes and Collective Bargaining* (Baker, Voorhis & Co., 1940), Vol. I, p. 455. Frankfurter & Greene, *op. cit., supra, ibid.*

When employees of neutral employers refuse to cross a picket line to perform work or render services beneficial to the offending employer at his place of business they are exerting pressure on him directly, not indirectly through the medium of their own employer. The primary employer himself observes and feels immediately the economic effect of this withholding of services. News and effect of the neutral employees' sympathetic action does not reach him only indirectly, when he is told about it by their employer. It is true, of course, that the neutral employer is not unaffected by such refusal of his employees to perform work or render services beneficial to the offending employer at the latter's place of business. To the extent that his business with the offending employer is carried on through the employees who refuse to cross the line, that business is automatically interrupted. Moreover, he may, as a result of that refusal, be "under greater or less economic pressure to end all business relations with the primary employer". *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591. But such pressure as the neutral employer feels is an in-

I. THE BOARD'S INITIAL APPROACH PROPERLY EFFECTUATED THE INTENTION OF CONGRESS TO PROTECT TRADITIONAL PRIMARY STRIKE ACTION.

A. Congress Intended to Outlaw in Section 8(b)(4)(A) Only Those Strikes and Inducements to Strike Which Were Familiar to it as "Secondary Boycotts."

The legislative history shows that Congress intended to outlaw only strikes and partial strikes which it considered "secondary." In his major speech introducing the Senate version of the bill which became the Act, Senator Taft thus summarized the effect of Section 8 (b)(4)(A): "It is made an unfair labor practice for any union to engage in a secondary boycott."[5] Throughout the Congressional deliberation upon 8 (b)(4)(A), its purpose was repeatedly described as the elimination of the "secondary boycott" from the arsenal of permissible union weapons.[6] In explanation of its aim, the Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 22, 1 Leg. Hist. 428):

> "* * * it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals

---

[5] 93 Cong. Rec. 3838, 2 Leg. Hist. 1012. "Leg. Hist." refers to the two volume edition entitled "Legislative History of the Labor Management Relations Act, 1947" (G.P.O., 1948).

[6] S. Rep. No. 105, 80th Cong., 1st Sess., 7, 8, 22, 54, 1 Leg. Hist. 413, 414, 428, 460; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, 1 Leg. Hist. 547; 93 Cong. Rec. 4131, 4138, 4837-38, 4858, 4859, 4865, 5005, 5011, 6445-46, 7537, A. 2252, 2 Leg. Hist. 1055, 1068, 1354-55, 1364, 1365, 1370-71, 1372-73, 1383, 1479, 1491, 1544, 1654, 1524.

cidental consequence, not a purpose or object, of his employees' action. *Douds* v. *International Longshoremen's Assn.*, 2 Cir., 224 F.2d 455, 459, cert. den., 350 U.S. 873.

For these reasons, the "activities of pickets at the place of their own employment where they are using the picket line to enforce their right to strike against their own employer is called a primary activity in the language of labor law." *Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 162, 191 F. 2d 642, 649, cert. den., 342 U.S. 869. And, whether made on the picket line, or by oral or written communication elsewhere, "a request to respect a primary picket line *at the Employer's premises* • • • is traditional primary strike action." *Oil Workers International Union, Local Union 346, (The Pure Oil Company)*, 84 N.L.R.B. 315, 319; *Newspaper & Mail Deliverers' Union (Interborough News Company)*, 90 N.L.R.B. 2135.

2. The Sympathetic Primary Boycott is Essential to Effective Strike Pressure.

Long ago it was recognized that the right to engage in primary picketing is as essential to self-organization and collective bargaining as the right to strike. A state, it was held, could not outlaw primary picketing "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace." *American Federation of Labor* v. *Swing*, 312 U.S. 321, 326. If workers were denied the right to induce a primary boycott of their employer they would have little if any power to engage in economic conflict with him over the terms and conditions of their employment. "Little indeed would be left of the right to strike • • •, if the striking employees were denied the concomitant right

in the goods of or does business with employer B (with whom the union has a dispute)."

Senator Taft said:[7]

"The difficulty with the Clayton Act and the Norris-LaGuardia Act is that they went at the situation with a meat ax. They practically eliminated all legal remedy against unions for any action taken by them. In effect they provide, as construed by the courts, at least —that any action by a union taken in order to advance its own interests is proper, and there is no legal recourse against the union. The laws referred to *do not discriminate between strikes for justifiable purposes and strikes for wholly illegal and improper purposes. They do not distinguish between strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes, and strikes in the nature of secondary boycotts* * * *. The acts simply eliminated all remedy against any union, leaving the union leaders free, practically without any control even by their members, to order strikes and boycotts and various kinds of actions that interfered, I believe certainly unlawfully under common law, with the activities of many other persons who were entirely innocent." [Emphasis added.]

Senator Pepper, quoting, *inter alia*, President Truman, contended that resort to a secondary boycott should be made illegal only if the union's objective in the primary dispute is improper or unjustifiable. 93 Cong. Rec. 4198-4199, 2 Leg. Hist. pp. 1107, 1108-1109. Senator Taft stated

[7] 93 Cong. Rec. 3835, 2 Leg. Hist., pp. 1005-1006.

of peacefully picketing the immediate business of their employer." *International Brotherhood of Teamsters, Etc. (Schultz Refrigerated Service)*, 87 N.L.R.B. 502, 504-505. "Such picketing, virtually synonymous with the right to strike, is an exercise of a historic right thought necessary to the effectiveness of a strike." *Ibid.*, at p. 507. If primary picketing were outlawed "the effect of a strike would be vastly attenuated" (*Douds* v. *Metropolitan Federation of Architects, Etc.*, S.D.N.Y., 75 F. Supp. 672, 675); "strikes would often be hopelessly crippled." *N.L.R.B.* v. *Service Trade Chauffeurs, Etc.*, 2 Cir., 191 F.2d 65, 67.

C. The Act Preserves the Right to Induce Neutral Employees to Engage in a Sympathetic Primary Boycott.

In the Wagner Act (Section 1) Congress sought to promote equalization of the bargaining power of workers with employers by protecting the right of employees to "assist" labor organizations and to engage in "concerted activities for mutual aid and protection" (Section 7). Because the term "employee" as defined in Section 2(3) and used in Section 7 was "not limited to the employees of a particular employer," the Act enabled striking employees to enlist the support of employees of other employers. Indeed, because the protection so accorded was unqualified, the Act protected even secondary boycotts. *N.L.R.B.* v. *Peter C. K. Swiss Choc. Co.*, 2 Cir., 130 F.2d 503, 505-506.

When Congress passed the Taft-Hartley Act it decided that to protect secondary boycotts was to go too far, and it enacted specific provisions, Sections 8(b)(4)(A) and (B), to outlaw them. *Supra*, pp. 22-29. At the same time, it did not abandon the objective—enhancement of the bargaining power of employees with respect to their employer

that the draftsmen had considered and rejected the view that the Section should distinguish between secondary boycotts in terms of the merits of or justification for the union's position in the primary dispute. He said (93 Cong. Rec. 4198, 2 Leg. Hist. 1106, 1107, 1108):

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. The Senator [Pepper] will find a great many decisions written by my father which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, *no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.* It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference *between different kinds of secondary boycotts.* So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice. * * * Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory on both sides. Someone else says to those employees, 'We want you to strike against your employer because he happens to be handling some produce which we do not like. We do not think it is made under proper conditions.' Of course if that sort of thing is encouraged there will be hundreds and thousands

of strikes in the United States. There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to strike because their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that. * * *

"[We condemn the view] that if other workers do not like the way some employer is treating his employees, they can promote strikes in any other plant which happens to be handling the product of the plant whose management the workers do not like. * * * I do not see how we can distinguish between a plant employing union labor and a plant employing non-union labor or between a plant paying good wages and a plant paying poor wages. * * * The members of the Committee do not see any way of distinguishing between those cases * * *."

Section 8(b)(4)(A) was also criticized on the ground that it prohibited workers employed by other employers from supporting strikers by refusing, in their own shops, merely to handle or work on goods coming from or destined for a struck employer.[8] It was contended that this prohibition unjustifiably disregarded the "community of in-

[8] 93 Cong. Rec. 4196-4197, 4844-4845, 4859, 2 Leg. Hist., pp. 1104-1105, 1106-1107, 1366-1368, 1371; see also the President's veto message, 1 Leg. Hist., p. 918

—for which protection of "employee" concerted activity was accorded. And it did not limit the definition of "employee" in Section 2 (3) to employees or prospective employees of the particular employer involved in the dispute. Thus, subject only to the prohibition against secondary boycotts, the right of strikers to enlist the sympathetic support of employees of other employers remained protected.

In the concluding proviso to Section 8 (b)(4), Congress demonstrated that it understood that preservation of traditional strike pressure meant that a striking union would remain free to induce employees of neutral employers to refuse to perform services "upon the premises" of the struck employer, since it provided that nothing in Section 8 (b) (4) should be construed to make such a refusal "unlawful."[18] *N.L.R.B.* v. *Rockaway News Co.*, 345 U.S. 71, 80; *Newspaper and Mail Deliverers' Union (Interborough News Co.)*, 90 N.L.R.B. 2135, 2146-2149; *Teamsters, Local 87 (DiGiorgio Wine Company)*, 87 N.L.R.B. 720, 746.

"Congress did not seek, by § 8 (b)(4), to interfere with the ordinary strike * * *. By § 13, Congress has made it clear that § 8 (b)(4), * * * [may not] be read so as to interfere with, impede or diminish the union's traditional right to strike, [unless] such interference, impediment or diminution is 'specifically provided for' * * *". *N.L.R.B.*

---

[18] The proviso reads as follows:

"*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

The proviso was retained in the same place in the Act as amended in 1959.

. *International Rice Milling Co.*, 341 U.S. 665, 673, citing *Amalgamated Assn. of Employees* v. *Wisconsin Board*, 340. U.S. 383, *United Electrical & Machine Workers (Ryan Construction Corporation)*, 85 N.L.R.B. 417, 418, and *Oil Workers International Union, Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 318-320. "Picketing has been equated with striking for the purposes of § 13." *N.L.R.B.* v. *Drivers Local Union 639*, 262 U.S. 274, 281, n. 9, citing *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, and *International Brotherhood of Teamsters, Local No. 807 (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502. Consequently, to induce compliance with their demands; employees and their union may "under § 13 strike and under § 7, peacefully picket the premises of their employer • • • ". *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75.

D. To Effectuate the Dual Objectives of Congress, the Language of Section 8(b)(4)(A) Must be Read as Applying Only to Secondary Strikes, Both Total and Partial, and Their Inducement.

From the outset the Board took the position that since Congress intended to preserve primary strike action, and to outlaw only secondary, not primary, boycotts, the language of Section 8 (b)(4)(A) must be construed as if the word "secondary" appeared in the Section before the terms "strike" and "concerted refusal." *International Brotherhood of Teamsters (Schultz Refrigerated Service)*, 87 N.L.R.B. 502, 504, n. 3 and accompanying text; *Oil Workers International Union, Local Union 346 (The Pure Oil Co.)*, 84 N.L.R.B. 315, 318, 319.

So qualified, the language of Section 8(b)(4)(A) would outlaw all union conduct which the legislative history showed Congress wished to reach and would effectuate Con-

gress' intention to limit "the scope of industrial conflict and the economic effects of the primary dispute" (*Local 1976, Carpenters' Union* v. *N.L.R.B.*, 357 U.S. 93, 106) by restricting "the area of industrial conflict" (*ibid.*, 357 U.S. at 100), to the situs of the primary dispute.

On the other hand, failure so to treat the "secondary" qualification as implicit would result in outlawing all primary strikes and traditional primary activity. No distinction between primary and secondary activity can be spelled out of the language of Section 8(b)(4)(A) itself. Every primary strike has as "*an* object thereof" to force the employer to "cease doing business" with another person in the hope that the resulting loss will force him to yield to the union's demand. The words "have sufficient latitude" to "reach out to and include" the effect of a strike in causing an interruption of "the business relation between an employee of the primary employer * * * and the primary employer * * *." *Douds* v. *Metropolitan Federation of Architects, Etc.*, S.D.N.Y., 75 F. Supp. 672, 675. As Judge Learned Hand pointed out in *Douds* v. *International Longshoremen's Assn.*, 2 Cir., 224 F. 2d 455, 459, cert. den., 350 U. S. 873, "cessation of business" is "the only sanction" any strike or concerted refusals to work "can have." In this respect there is no distinction between a primary strike and a secondary strike. Each has the *tactical* objective of causing a cessation of business in furtherance of the *ultimate* objective, i.e., acquiescence in a demand. To distinguish between the two it is necessary to go beyond the "an object" test to the nature of the demand being made upon the struck employer.

In a primary strike that demand relates to unionization or terms or conditions of employment in the struck employer's establishment; the union's ultimate objective is to affect the struck employer's relations with his own employees. In a secondary strike the demand relates to

organization or conditions of employment of employees of another employer; the strike is used as a medium by which to exert pressure on an employer whose own employment policies and practices are not in dispute to induce him in turn to exert pressure on another employer to force the latter to yield to the union's demand. In other words, in a secondary strike the union's ultimate demand relates to the terms and conditions of employment of persons employed by, or seeking employment with, someone other than the employer against whom strike pressure is directed. *Douds* v. *International Longshoremen's Assn., supra; Douds* v. *Metropolitan Federation of Architects, Etc.*, S.D. N.Y., 75 F. Supp. 672, 675; *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 216-218, 265 F. 2d 585, 590-592.

Just as it is necessary to go beyond the words of Section 8(b)(4)(A) to distinguish between the primary and the secondary in the case of total strikes, it is also necessary to do so in the case of "concerted refusals."[19] When, for instance, at the request of pickets, two or more employees of a neutral employer, out of sympathy with strikers, refuse to cross a picket line at the struck employer's premises, unless their own employer desires that they not

---

[19] The language of Section 8 (b) (4) (A) reflects careful draftsmanship to reach all strike action which Congress desired to illegalize. The outlawry of "strikes" contemplates a total work stoppage by employees of a neutral employer. The parallel outlawry of "concerted refusals" envisions the partial strike, *i.e.*, refusal only to work on or handle goods of or for the primary employer. The phrase "concerted refusal" of "the employees of any employer" to perform "work" or render "services" is the dictionary definition of "strike." See, Webster's New International Dictionary (G. & C. Merriam Co., 1960), p. 2496; Black's Law Dictionary (West Publishing Co., 1951), p. 1591; American College Dictionary (Random House, 1952), p. 1198, definition 60.

cross (*Local 1976, Carpenters' Union* v. *N.L.R.B.*, 357 U.S. 102, 105-107), they are engaged in a "concerted refusal" to serve their own employer at the struck premises.

Since every work stoppage by neutral employees entails, *pro tanto*, a cessation of business, resort to the "an object" test is no more useful in distinguishing between sympathetic primary support, which employees of neutral employers may lawfully extend to strikers, and sympathetic secondary support, which they may not, than it is in distinguishing between primary and secondary in the case of total strikes. To apply the "an object" test without distinguishing between supporting action which is primary and that which is secondary would convert "lawful primary action" into unlawful "secondary action" and "might well outlaw virtually every effective strike. * * *" *Oil Workers International Union, Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 320. Undifferentiated application of the "an object" test would mean that by picketing a struck employer's premises, at least if it is successful in inducing two or more employees of a neutral employer to stay out, the union has resorted to an illegal secondary boycott. Since "activities * * * directed solely toward maintaining the observance of [a] primary picket line [by employees of neutral employers do] not fall within the ban against secondary activity" (*Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 162, 191 F. 2d 642, 649, cert. den., 342 U.S. 869), such a conclusion could not be valid. *Milwaukee Plywood Company* v. *N.L.R.B.*, 7 Cir., No. 12991, decided Dec. 20, 1960; *Seafarers International Union Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591. It is necessary, therefore, to look elsewhere than the language of Section 8(b)(4)(A) for the key to differentiation between primary and secondary partial strike action by neutral employees.

Clearly, the key cannot lie in ascertaining whether the neutral employer whose employees were induced to take sympathetic action was injured thereby. *Any* unauthorized sympathetic action on the part of the neutral's employees affects his business relations and necessarily injures the neutral employer. Therefore, the presence or extent of such injury cannot aid in distinguishing its source as primary or secondary activity. If the activity is primary, the resulting "harm" to the neutral employer is merely "incidental" to the exercise of a legal right, not a basis for finding violation. See pp. 100-102 *infra*. To hold otherwise "would be virtually to deprive [unions] of a weapon which Congress meant to preserve." *N.L.R.B.* v. *Service Trade Chauffeurs, Etc.*, 2 Cir., 191 F. 2d 65, 67, 68.

At the same time, if the activity which the union sought to induce neutral employees to engage in is secondary, the union should not gain immunity because its "inducement" or "encouragement" did not succeed. Even if the neutral employees fail to respond to the appeal, and the neutral employer, in consequence, suffers no injury, the union's resort to illegal inducement should stand as a violation.[29]

Injury to the neutral employer could not provide a basis for distinction for yet another reason. Congress did not undertake in the Act to safeguard neutral employers, or primary employers or the public either for that matter, even against the injuries effected by "*secondary* boycotts as such." [Emphasis supplied.] *Local 1976, Carpenters' Union* v. *N.L.R.B.*, 357 U.S. 93, 99-100. Under Section

[29] *N.L.R.B.* v. *Associated Musicians*, 2 Cir., 226 F. 2d 900, 904-905, cert. den., 351 U.S. 962; *N.L.R.B.* v. *Knitgood Workers Union, Local 155*, 2 Cir., 267 F. 2d 916, 920; *N.L.R.B.* v. *Dallas General Drivers, Etc., Local No. 745*, 5 Cir., 264 F. 2d 642, 648, cert. den., 361 U.S. 814; *N.L.R.B.* v. *Laundry, Etc. Drivers Local No. 928*, 9 Cir., 262 F. 2d 617, 620.

8(b)(4)(A) as it originally stood a union could lawfully coerce a neutral employer to engage in a boycott by threatening to induce his employees to strike. *Schatte* v. *International Alliance of Theatrical Stage Employees*, 9 Cir., 182 F. 2d 158, 165, cert. den., 340 U.S. 827; *Rabouin* v. *N.L.R.B.*, 2 Cir., 195 F. 2d 906, 911-912.[21] It was free to exert pressure on the neutral by invoking a consumer boycott against him. *Ibid.* If the secondary employer succumbed to such pressure and ceased to do business with the primary employer "there is no unfair labor practice." *Local 1976, Carpenters' Union* v. *N.L.R.B.*, 357 U.S. 93, 99. The resulting injury to the neutral employer is the same whether he succumbs as a result of a strike threat, a consumer boycott, or an actual strike of his employees or its inducement. Therefore injury to the neutral employer plainly could not provide the touchstone for distinguishing between outlawed secondary and permitted primary conduct.

The key to the distinction can lie only in the other provisions of the Act and in the legislative history which show that Congress did not intend to outlaw "any of the primary means which unions traditionally use to press their demands on employers." *Oil Workers International Union, Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 318. Picketing at the primary employer's

---

[21] Congress in the 1959 Act made it unlawful to threaten, coerce, or restrain a neutral employer to compel him to engage in boycott. Act, Section 8 (b) (4) (ii) B, see 105 Daily Cong. Rec. 13092, July 27, 1959, II Leg. Hist. L.M.R. & D.A. 1523 (1). To induce an employer to engage in a boycott by persuasion remains lawful. See 105 Daily Cong. Rec. A4308, May 21, 1959, A8464, Sept. 30, 1959, II Leg. Hist. L.M.R. & D.A. 1750(1), 1841(3). "Leg. Hist. L.M.R. & D.A." refers to the two volume work "Legislative History of the Labor-Management Reporting and Disclosure Act of 1959" (G.P.O. 1959).

premises is such a traditional primary means, pp. 30-36, *supra*. Consequently, the normal, expected response of employees of neutral employers—refusal to render service or perform work behind such a picket line—must be considered primary, not secondary, sympathetic action.

Just as it is necessary to determine whether a strike or partial strike is primary or secondary before the "object" language of Section 8(b)(4)(A) can come into play, so it is necessary to determine whether strike action which a union seeks to induce or encourage is primary or secondary before the "object" test can be applied to the inducement itself. Otherwise, the outlawry of inducement and encouragement would ban not only all primary picketing, but all inducement of primary strikes as well.

Since it is evident that Congress cannot have intended that the language of Section 8(b)(4)(A) be applied as it reads,[22] it is pertinent to inquire why Congress did not clarify the language by inserting the word "secondary" before "strike" and before "concerted refusal." On the basis of the legislative history set forth above, it is reasonable to infer that it did not do so because it feared that, if it did, the word "secondary" might be construed, as Senator Pepper urged, pp. 25-26, *supra*, to encompass only such strike action as was considered "secondary" by those courts which applied the "unity of interest" and "community of interest" tests, pp. 26-27, *supra*. By omitting from the Section the word without which it could not rationally be given a literal application, Congress compelled resort to the legislative histor , thereby avoiding

---

[22] "Section 8 (b) (4) must be interpreted and not merely read literally." *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591; *Milwaukee Plywood Company* v. *N.L.R.B.*, 7 Cir., decided Dec. 20, 1960, 47 LRRM 2291.

the risk of choice by the Board and the courts between conflicting judicial views.

This inference, and our contention that Section 8(b)(4)(A) must be read as if the word "secondary" preceded both "strike" and "concerted refusal" are both confirmed by the action which Congress took in 1959 when it amended Section 8(b)(4)(A). At the end of the revised Section, which was formerly Section 8(b)(4)(A), Congress added the following proviso:

> "*Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

The House Conference Report stated, "The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute." H. Rep. No. 1147, 86th Cong. 1st Sess., p. 38., I Leg. Hist. L.M.R. & D.A. 942. While again use of the word "secondary" was avoided, the proviso confirms that now, as from the beginning, the prohibitory language must be read as applicable only to secondary strike action and its inducement.

E. The Board's Initial Approach Correctly Conceived and Properly Applied the Primary-Secondary Distinction.

From the beginning the Board saw the problem of distinguishing between primary and secondary strike action as one of effectuating "Congress' belief that labor disputes should be confined to the business immediately involved • • • ." *United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Company)*, 81 N.L.R.B.

802, 812., enforced, 10 Cir., 184 F. 2d 60, cert. den., 341 U.S. 947, see *N.L.R.B.* v. *Denver Bldg. and Construction Trades Council*, 341 U.S. 675, 681; cf. *Local 1976, Carpenters' Union* v. *N.L.R.B.*, p. 40, *supra*. Accordingly, while a union was entitled to exert full strike pressure against the primary employer, it was not entitled to direct strike pressure against a neutral employer. As the court below put in in *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591, a union is entitled "to place a boycott on [the primary employer] alone, with only an incidental economic effect on" neutral employers; it is not entitled "to place a boycott on [neutral employers] along with" the primary employer.

Moreover, the union must confine its exertion of strike pressure against the primary employer to the situs of the labor dispute, *i.e.*, to the "immediate business of [that] employer." *International Brotherhood of Teamsters Etc. (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502, 505.

The Board applied and elaborated these basic principles in a variety of early cases. Where the union applied strike pressure at a locale where the primary employer was not engaged in business, the Board had no difficulty in concluding that it had unlawfully enlarged the area of dispute. In *United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Company)* 81 N.L.R.B. 802, enf'd. 10 Cir., 184 F. 2d 60, cert. den., 341 U.S. 947, the union was engaged in a labor dispute with a manufacturer of prefabricated houses. It picketed the construction site where a neutral independent contractor, who had purchased some houses from the manufacturer, was engaged in erecting them. The Board held that by picketing at the construction project, by placing the contractor on an "unfair" list, and by inducing one carpenter employed by the con-

tractor to cease work on the project the Union had engaged in secondary activity proscribed by Section 8(b)(4)(A). In *Printing Specialties and Paper Converters Union (Sealright Pacific Ltd.)*, 82 N.L.R.B. 271, the union was engaged in a dispute with a manufacturer. It picketed trucks delivering the manufacturer's goods when they stopped at the premises of his customers. Because the trucks were owned and operated by an independent transportation company, the Board found the picketing, at a place remote from the situs of the primary dispute, unlawful. In *Metal Polishers, Buffers, Platers and Helpers (Climax Machinery Company)*, 86 N.L.R.B. 1243, the union was engaged in a labor dispute with a manufacturer engaged in decorative plating. It induced employees employed by another employer at a separate plant at a different location, to refuse there to do hard-chrome plating work on goods supplied by and to be returned to the struck employer. The Board noted that this kind of job had been similarly contracted out by the primary employer before the strike, and that therefore no "ally" question was presented (see *Douds* v. *Metropolitan Federation of Architects*, S.D. N.Y., 75 F. Supp. 672). The Board held (86 N.L.R.B. at 1252) that neither the contractor-subcontractor relationship nor the fact that both employers were engaged in the "same general business" immunized the union's exertion of strike pressure at a place which was not a situs of the primary dispute.

Where the union exerted or sought to exert strike pressure at a place where the primary employer was located, and which therefore was a situs of the primary dispute, implementation of the statutory policies required that several factual situations be distinguished:

(1) Cases in which the *only* services which employees of neutral employers were called upon by their employer to

perform at the picketed premises were done for the primary employer.

(2) Cases in which *some* of the services which the employees of the neutral employer were called on to perform at the picketed premises were done for the primary employer, whereas other services were not;

(3) Cases in which *none* of the services which the employees of the neutral employer were called upon to perform at the picketed premises were done for the primary employer.

For the reasons set forth above, pp. 29-39, 44-47; *supra*, a union was entitled, as an integral part of its exertion of primary strike pressure against the offending employer, to induce employees of neutral employers, on a picket line or away from it, to refuse to perform work or render service of benefit to the offending employer at any place where the performance of such work or service involved direct contact between the neutral employees and the primary employer, *i.e.*, at his premises or at any other place where the primary employer was engaged in business.

On the other hand, the union was not entitled to induce employees of neutral employers to refrain from performing, even at a situs of the primary dispute, work or services which did not involve the primary employer. For interruption of such work or services *could not*, of itself, exert any direct economic pressure on the primary employer; it could affect him only indirectly, as a result of pressure which might be brought to bear on him by the neutral employer, whose business dealings with others than the primary employer would be disrupted by the work stoppage.

Accordingly, the Board's judgment in each case turned on whether the sympathetic strike action which a union took, or sought to induce employees of neutral employers

to take, was limited to such work or services as involved the primary employer which were to be performed at the situs of the primary dispute.

1. Cases in Which the Only Services Which Employees of Neutral Employers Perform at the Situs of Dispute Involve the Primary Employer.

Generally, in cases in this category, the primary dispute concerns a business which is located on premises owned or controlled by the primary employer. Normally, the neutral employers who come upon the premises do so for the purpose of doing business with or rendering service to the primary employer. In such cases, all the services which employees of the neutral employers perform at the situs involve or benefit the primary employer. Consequently the union is entitled to induce these employees to refuse to perform all work or service there. They are not entitled, however, even there, to induce a strike or work stoppage by these employees or others elsewhere, for that would constitute exertion of forbidden strike pressure against their neutral employer, pp. 46, 48, *supra;* cf. p. 66, *infra.*

In *United Electrical & Machine Workers (Ryan Construction Corporation)*, 85 N.L.R.B., 417, 418, Ryan, a general contractor, was engaged in constructing an addition to Bucyrus' plant. The plant was located on a 35 acre tract enclosed by a wire fence. 85 N.L.R.B. at 425. Some 500 feet from the main gate, and near the construction area, Bucyrus had installed a separate gate for the exclusive use of Ryan, his employees and suppliers. In the course of a strike against Bucyrus the union picketed all entrances to the property, including the "Ryan gate" with signs publicizing its dispute, but not identifying Bucyrus by name, 85 N.L.R.B., at 420, n. 3. Ryan's employees refused to cross the picket line and work on the construction project ceased.

The Board held (85 N.L.R.B., at 418-419) that the picketing was "in support of a labor dispute *with Bucyrus*," and the picket signs "were directed at Bucyrus, *not Ryan*." Therefore the picketing at the Ryan gate was primary, not secondary, even though "Ryan employees were the only persons regularly entering Bucyrus premises at that gate." The Board said:

> "Concededly, an object of the picketing was to enlist the aid of Ryan employees, as well as that of employees of all other Bucyrus customers and suppliers * * * When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' * * * whether 1 or 100 other employees wish to enter the premises. It follows * * * that the picketing of Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus*, did not lose its character and become 'secondary' at the so-called Ryan gate because Ryan employees were the only persons regularly entering Bucyrus premises at that gate. While we agree that Section 8(b)(4)(A) represents an intent by Congress to restrict union action to the 'parties immediately involved,' as the dissent states, we do not agree that by picketing the Ryan gate the Respondents were enlarging the area of the dispute. The signs and placards carried by the pickets at the Ryan gate, which were the same as the signs carried at other gates of the Bucyrus premises, were directed at Bucyrus, *not Ryan*." [Emphasis in original.]

The emphasis in the *Ryan* case, on the fact that the picket signs were directed at Bucyrus, not Ryan, showed clearly that the Board was not sanctioning, at the primary employer's premises, inducement of a strike against a

neutral employer or any strike action away from the situs of the primary dispute.

In *Oil Workers International Union Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 318-320, a dock which belonged to, and was operated by, Standard, the primary employer, was declared to be "hot" by virtue of a labor dispute over terms and conditions of employment affecting Standard's employees who worked at the dock. Shortly before and in anticipation of picketing at the dock, Standard entered into arrangements with Pure Oil under which Pure undertook to have its employees perform at the dock, in connection with Pure products, operations which had previously been performed by Standard's striking employees. By picketing the dock, the union induced Pure's employees not to perform the loading operations. The union also by letter notified another union representing employees of the independent carrier which transported Pure's products that the dock was "hot" except when operated by Standard's foremen. As a result, the employees on the vessels refused to take on Pure's cargoes at the dock, except when they were loaded by Standard's foremen. The Board held (84 N.L.R.B., at 319), that both the picketing and the letters "must be viewed as an integral part of [the union's] lawful right to take primary action in support of its demands on Standard Oil * * * [because the response they asked of employees of neutral employers was] to refuse to perform services only *at the Standard Oil dock*" and "to respect a primary picket line *at the Employer's premises.* This is traditional primary strike action." The Board emphasized (84 N.L.R.B. 319, n. 7) that the union had not induced any refusal to handle Pure Oil's products away from the dock and had expressed no objection to the loading of those products even at the

Standard dock except by rank and file employees who would to that extent be replacing Standard's striking dock employees. It found therefore that the union had directed its strike pressure against Standard only, and not against Pure.

Similarly, in *Newspaper and Mail Deliverers' Union (Interborough News Company)*, 90 N.L.R.B. 2135, the Board found that a union, engaged in a dispute with the operator of newsstands, which approached employees of publishers at places away from the newsstands and there induced them not to deliver newspapers to the struck newsstands thereby engaged in primary, not secondary, conduct because the union's inducements "invited action *only* at the premises of the primary employer whose employees were on strike."

2. Cases in Which Employees of Neutral Employers Perform Some Services at the Situs of the Dispute Which Involve the Primary Employer, and Other Services Which Do Not.

In this class of cases, the business of the primary employer is not conducted entirely on premises he owns or controls. Instead, he conducts business, for shorter or longer periods of time, on premises of a neutral employer. The primary employer in these cases comes to the neutral's premises in order to do business with the neutral employer, *i.e.*, to render services to or receive services from him. No employees of other neutral employers come to those premises to serve the primary employer at all. But employees of the neutral employer may be called upon to perform work or services involving the primary employer while he is on the premises. To the extent that the business transactions which take place there entail the performance of such work or services, the neutral employees are subjects of lawful inducement to refrain from performing them. But insofar as

the work or services of the neutral employer's employees do not involve the primary employer, they may not lawfully be induced to refrain from performing them. The neutral employer is entitled to protection against work stoppages and their inducement insofar as work unrelated to the primary employer is involved. On the other hand, the Union is entitled to stop and to induce stoppage insofar as work related to the primary employer is involved. That is why, in such cases, as the Board put it in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547, 549:

> "the problem is one of balancing the right of a union to picket at the site of its dispute as against the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved.
>
> "When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights."

This was the problem which, the Board said in its Brief to this Court in the *Denver* case, No. 393, Oct. Term, 1950, p. 26, called for "Effectuation of the dual objectives of Congress, *i.e.*, to shield neutral employers from involvement in quarrels not their own, and to preserve the right of labor organizations to bring effective economic pressure to bear upon primary employers" impelling the Board "to invoke additional criteria, supplementary to the situs test, for determining whether the primary employer or a neutral employer is the target of the particular strike action." The "roving" or "ambulatory" situs cases focused the issue.

In *International Brotherhood of Teamsters, Etc., (Schultz Refrigerated Services)*, 87 N.L.R.B. 502, the pri-

mary employer operated a fleet of trucks. The union, in a labor dispute involving the drivers, followed Schultz's trucks to the premises of his customers and consignees. When they stopped, the union picketed around the trucks with signs announcing that the drivers were replacing union members whom Schultz had locked out of their jobs. The union intended thereby to induce the employees of Schultz's customers and consignees not to "unload the trucks." 87 N.L.R.B., at 510. As soon as the trucks left the picketing stopped. Because of the "identification of [this] picketing with • • • [Schultz's] business at the *situs* of the labor dispute" (87 N.L.R.B., at 505), the Board concluded that the "picketing was directed solely at the continued functioning of Schultz's business," rather than against the business of the customers. 87 N.L.R.B., at 508. In the *Sterling Beverages* case,[23] the primary employer's roving trucks were also the situs of the dispute. The Board found that picketing at the premises of a customer, a neutral brewery, was secondary insofar as it occurred before the primary employer's trucks arrived and continued after they had left, for to that extent it induced neutral employees to engage in work stoppages at times when the premises of the brewery were not within the "area of the dispute." The Board pointed out (90 N.L.R.B., at 403) that what is "necessary to a finding of purely primary picketing" is a "direct and immediate relationship between the picketing and the object picketed," *i.e.*, the instrumentality of the primary employer's business. The picketing in this case, "unlike that in the *Schultz* case which was directed solely at Schultz trucks, was not confined to the primary Employer's *trucks*, but extended directly to the

---

[23] *International Brotherhood of Teamsters, Etc. (Sterling Beverages, Inc.)*, 90 N.L.R.B. 401.

secondary employer's own premises." (Emphasis in original.)

In *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547, the primary employer was Samsoc, whose vessel, the Phopho, was involved in a labor dispute with the Sailors' Union. The vessel was undergoing repairs in a shipyard operated by Moore Dry Dock Company, a neutral employer. Denied permission to picket at the dock where the Phopho was moored, the union picketed the entrance to the shipyard with signs publicizing its dispute with Samsoc.

The Board held that it was entirely proper for the Union in aid of its dispute with Samsoc by such picketing and inducements away from the picket line to seek to induce employees of Moore and employees of other neutral employers who were scheduled to work on the Phopho in the Moore shipyard to refrain from doing such work. But it articulated the need, in such cases, where employees of neutral employers perform at the situs of the dispute work wholly unrelated to the primary employer, to assure that the picketing union did not deliberately invite stoppages by neutral employees more widespread than cessation of that work or services which involved the primary employer.

To that end the Board enunciated a series of rules or conditions applicable to picketing a primary employer who is doing business at the premises of a neutral employer. The Board declared (92 N.L.R.B., at 549) that such picketing would be deemed primary if:

> "(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business

at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer."

If these rules were complied with, the Board would hold the picketing primary and protected. If employees of neutral employers of their own volition, either because of their reluctance in general to cross any picket line or because of their sympathy with the strikers, chose to stop work not involving the primary employer, the union could not, without unduly impairing its right to strike, be held to have "induced or encouraged" them to do so. See pp. 59-61, *infra*.

In the *Moore* case itself the Board found (92 N.L.R.B., at 549-551) that the union had met all of the conditions as laid down. It emphasized particularly that the union "was scrupulously careful to indicate" through the signs carried by its pickets and its requests to other unions for cooperation "that its dispute was solely with the primary employer, the owners of the *Phopho*," and not with Moore, the owner of the dock. Thus, "no attempt was made to interfere with other work in progress in the Moore yard;" and the appeals for cooperation invited "action only at the *situs* of dispute." 92 N.L.R.B., at 551.

3. Cases in Which Services Performed by the Employees of One or More Neutral Employers at the Situs of the Dispute Do Not Involve the Primary Employer.

In this class of cases the primary employer locates his business temporarily or permanently on premises of a neutral employer or third person either for the purpose of doing business or rendering a service to that person or for the purpose of transacting business there with other third

parties. At times, such premises are the scene of independent businesses carried on for more or less lengthy periods by many different employers; the various employers may or may not be involved, as on a construction job, in a common project. The common characteristic of these cases is that the employees of the neutral employer or employers who do business more or less permanently on the picketed premises perform no services for the primary employer. Plainly, the union was not entitled, merely because of the geographic proximity or because of any economic interest of the neutral employer in having the primary employer continue to function, to take strike action against such neutral employers or induce their employees to cease to perform any of their work, since none of it involves or is performed for the primary employer. At the same time, the union was not to be barred by the more or less fortuitous geographic nexus between independent business enterprises from exercising its right by picketing, and by other traditional methods, to seek to induce anyone and everyone, including employees of other neutral employers who come to the situs to render service to the primary employer, to boycott him by refusing to render such services to him there.

In *Montgomery Fair*,[24] the primary employer was a carpentry contractor engaged in a remodeling job at a department store, which was a neutral in the dispute between the contractor and the union. Nevertheless, the union picketed the store with signs reading "Montgomery Fair Unfair to Union Labor." The Board concluded that, being directed at a neutral employer, the picketing was secondary, not primary, even though it occurred at a place which

---

[24] *Local 1796, United Brotherhood of Carpenters, Etc. (Montgomery Fair Co.)*, 82 N.L.R.B. 211.

was a situs of the dispute. See also the *Roane Anderson* case.[25]

In the *Gould & Preisner* case,[26] because the union's by-laws and rules provided that "no union man can work on a picketed job" (82 N.L.R.B., at 1210), its action in placing a picket at a construction project with a sign describing the "job" as unfair amounted not merely to "inducement" of the employees of neutral contractors on the project, but to an actual "signal in the nature of an order to the members of affiliated unions [employed by neutral employers] to leave the job and remain away until otherwise ordered." *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 678-679.

In other cases where the service of employees of neutral employers at the situs of dispute was rendered entirely to others than the primary employer, unions purported to comply with some or all of the *Moore Dry Dock* rules. However, by the conduct of the pickets, or other related conduct away from the picket line, the unions deliberately induced employees of neutral employers to refrain during the dispute from performing work or services which did not involve the primary employer at all. See *International Brotherhood of Boilermakers (Richfield Oil Corporation)*, N.L.R.B. 1191;[27] *Chauffeurs, Teamsters, Ware-*

---

[25] *Local 760, International Brotherhood of Electrical Workers (Roane-Anderson Co.)*, 82 N.L.R.B. 696.

[26] *Denver Building & Construction Trades Council (Gould and Preisner)*, 82 N.L.R.B. 1195.

[27] In light of subsequent developments in Board doctrine, see pp. 77-82, *infra*, it may be noted that in this case the Board unanimously declared that the fact that Samsoe, the primary employer in the *Moore* case, had "no regular place of business which could be picketed by the Union," whereas here the primary employer did, was "not controlling" on this issue. 95 N.L.R.B. at 1193, n. 4.

housemen & Helpers (Hoosier Petroleum Company, Inc.), 106 N.L.R.B. 629, enforced 7 Cir., 212 F 2d 216.

The Board took into account the "very practical fact" that in these cases even if the union refrained from any direct inducement of neutral employees, near the picket line or away from it, employees of neutral employers who performed no services or work whatever for the primary employer, might, simply upon observing the picket line, "take action sympathetic with the strikers and * * * put pressure on their own employers" whether such a response was "intended or not, sought for or not, aimed for or not," by the pickets. *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 216, 265 F. 2d 585, 590. Consequently, the most the Board could do in such cases, without stultifying the union's right to picket the primary employer, was require the union by strict adherence to the *Moore Dry Dock* rules to make absolutely clear to the neutral employees that its dispute lay with the primary employer and not with any neutral employers, and, of course, absolutely to refrain from any direct or intended inducement of the neutral employees to cease work, near the picket line or away from it. If the union went beyond the permissible limits of *Moore Dry Dock*, directly inducing employees of neutral employers to cease work not involving the primary employer, the Board found its conduct, to that extent, secondary.

In *United Association of Journeymen, Etc. (Columbia-Southern Chemical Corporation)*, 110 N.L.R.B. 206, the union was engaged in a dispute with Westheimer, a contractor, over employment of its members on a project on Columbia-Southern's premises. Various other contractors were simultaneously engaged in performing unrelated construction work for Columbia-Southern. At the entrance

road to the premises the union placed pickets with signs advertising its dispute with Westheimer. 110 N.L.R.B. at 218. In consequence, employees of other contractors stopped work. The Board found the picketing secondary because the union had (110 N.L.R.B., at 208):

> "• • • made no effort to obtain permission from Columbia-Southern to picket inside the construction area at the actual situs of the primary dispute, Westheimer's boiler removal job—but chose, rather, to picket at a remote approach to the plant premises used by employees of secondary employers in common with the employees of Westheimer."

From the location of the picket line, and from statements made before the picketing began by union agents that if Westheimer did not yield the union would remove its men employed by other contractors on other jobs on Columbia-Southern's premises, the Board concluded that, "while the picket signs referred only to Westheimer as the target of the picketing," the fact that employees of neutral employers who were performing work not involving Westheimer refused to cross the line was a "deliberately designed" result, and not merely an "unavoidable incident of the picketing."

4. The Appropriate Function, Under the Board's Initial Approach, of a Separate Gate or Entrance to Plant Premises for the Exclusive Use of Independent Contractors.

As the foregoing discussion demonstrates, a separate or reserved gate could only serve a legitimate function in those situations where the neutral employees perform no service directly for the primary employer. For in such circumstances, since the neutral employees may not law-

fully be subjected to picket line inducement except that which is an unavoidable concomitant of primary picketing directed to those who are performing services for the primary employer, it is appropriate and proper to isolate them and thus avoid the incidental repercussions which may occur when they pass through a common gate. But where the neutrals are performing services for the primary employer it is the union's right, guaranteed to it by the statute, to enlist their aid—such appeals are of the very essence of primary activity. In such a case, the isolation of neutral employees by using a reserved gate would be merely a device by which the primary employer could thwart the union's right to engage in traditional primary activity.

Thus, while it is perfectly proper for a factory owner to establish a reserved gate for the exclusive use of outside contractors to immunize his employees in the event a union has a labor dispute with one of the contractors—since his employees perform no service for the contractor—it would subvert the intent of Congress to permit the use of that gate to immunize the contractor's employees—who are serving the factory owner—in the event that the factory owner himself becomes involved in a labor dispute. The record shows (R. 39; 66, 117, 179) that it was for the former, legitimate, purpose that General Electric initially established the separate gate at Appliance Park; it is for the latter, illicit, purpose that its use was sanctioned here.

F. In the Quartet of "Secondary Boycott" Cases Decided on June 4, 1951, This Court Found That the Board's Construction and Application of the Primary-Secondary Distinction Conformed With Congress' Dual Objectives.

It was the Board's foregoing approach to construction and application of Section 8 (b)(4)(A) which in its June 4, 1951, decisions,[28] this Court considered and held to be in "conformity with the dual congressional objectives * * *." *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 692.

It found that "While § 8 (b)(4)(A) does not expressly mention 'primary' or 'secondary' disputes, strikes or boycotts" (341 U.S. at 686), Congress went no further in "shielding unoffending employers and others from pressures in controversies not their own" (341 U.S., at 692), than "draw the line at secondary boycotts." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 2 Cir., 181 F. 2d 34, 40, aff'd, 341 U.S. 694. "The substantive evil condemned by Congress in § 8 (b)(4) is the secondary boycott * * *." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 705.

In *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, the union, seeking to organize the Kaplan mill, picketed the mill with signs saying "This job is unfair * * *." 341 U.S., at 669. When two employees of the Sales and Service House, a customer of the mill, approached in a truck to obtain rice or bran for their employer, the pickets stopped the truck and told the employees that "the truck would

---

[28] *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665; *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694; *Local 74, United Brotherhood of Carpenters* v. *N.L.R.B.*, 341 U.S. 707.

have to go back" (341 U.S., at 669). Later, when the employees on the truck tried to approach the mill by a short detour, "the pickets ran toward the truck and threw stones at it." 341 U.S., at 670.

1. The Holding That the Conduct of the Pickets Directed Toward the Neutral Employees Constituted Primary, Not Secondary, Action.

The Board in its decision had held (84 N.L.R.B. 360, 361), that since the activities of the pickets in relation to the Sales and Service House employees "arose out of the *primary* picketing of the Kaplan mill, and were carried out in the immediate vicinity of the mill" they were primary rather than secondary and that the violence did not transform it from primary into secondary action. The Court of Appeals for the Fifth Circuit reversed. Alone of all the courts of appeal which prior to that time had considered Section 8 (b)(4), it held (183 F. 2d 21, 26), that the Section was to be construed:

> "without resort to any distinction between primary and secondary activities. If the union's activities come within the language of the statute, they constitute an unfair labor practice, regardless of whether they might have been considered a true "secondary boycott" under the old common law or under any of the modern and popular theories."

Applying the language, the court said (*ibid.*, at pp. 26-27) that the activities of the pickets:

> "became secondary when the strikers attempted to induce and encourage the employees of this neutral employer Sales House. The fact that they occurred near the struck employer's plant is not enough to

draw such a distinction as the Board attempts to draw, especially where there is violence.

. . . . . .

"To allow the Board to rule such activity as prohibited by the statute not to be a violation thereof, simply because it occurred in the vicinity of the struck employer's plant, would render the section ineffective and insufficient."

This Court reversed. As it contemporaneously stated in *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 687, "we supported the Board in its conclusion that such conduct was no more than traditional and permissible in a primary strike." In *Rice Milling*, it pointed both to Sections 7 and 13 and to the legislative history as making it clear that Congress had not intended Section 8 (b)(4) to be read "to interfere with, impede or diminish the union's traditional right to strike." 341 U.S. 665, 672-673. As illuminating the content of that right, the Court cited, *inter alia*, the Board's decisions in *Ryan* and *Pure Oil*. 341 U.S., at 673, n. 6. See pp. 50-53, *supra*.

While thus rejecting the Fifth Circuit's repudiation of the Board's distinction between primary and secondary action (*Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 162, 191 F. 2d 642, 649, cert. den., 342 U.S. 869), this Court was careful to disavow the inference that inducement of neutral employees was necessarily primary simply because it "occurred near the struck employer's plant." It said that the fact that the inducements complained of occurred "in the geographically restricted area near the mill is significant, although not necessarily conclusive." 341 U.S., at 671. What was decisive was that there was no attempt by the union "to induce any action

by the employees of the neutral employer which would be more widespread" than refusal to cross a picket line at the primary employer's premises. 341 U.S., at 671. Thus, "The union did not engage in a strike against the customer. It did not encourage action by the customer's employees to force the customer to boycott the mill." *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 687-688.

Plainly, the Court implied, if the pickets had asked the employees in the truck not only to turn back, but to go on strike against Sales and Service House, or to refuse, away from the Kaplan mill, to handle Kaplan products, the Court would have found the conduct of the pickets secondary, and the fact that the inducement took place near the mill would not have provided immunity. The Court observed, however, that Section 8 (b)(4)(A) proscribes only "encouragement to some concert of action greater" than refusal of employees of a neutral employer to cross a primary picket line. 341 U.S., at 671. True, the union's signs had described "the job" rather than Kaplan as unfair and thereby left somewhat doubtful the extent of the support the union was seeking to evoke. But, the Court noted, inducements "directed * * * toward" employees of neutral employers "only as they happen to approach the picketed place of business generally are not aimed at concerted * * * conduct" any greater than refusal to cross the line. *Ibid.* Upon this finding that the conduct of the pickets was primary rather than secondary, the Court deemed it unnecessary to "determine the specific objects toward which a union's encouragement of concerted conduct must be directed in order to amount to an unfair labor practice * * *." *Ibid.*

2. The Findings in *Denver* and *Langer* That the Strike Action Was Directed Against Neutral Employers.

This Court reached the question thus reserved in *Rice Milling* in the *Denver* and *Langer* cases only after finding that the strike action in those cases unlike that in *Rice Milling*, was directed against a neutral employer, not the primary employer. *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 687-689, and *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 697. In each case the union was engaged in a dispute with one subcontractor on a construction project over his employment of non-union labor. In each the union picketed the project with signs saying "this *job* unfair," neither identifying the contractor involved in the dispute nor limiting its dispute to him. 341 U.S., at 678, 679, 697. In its brief to this Court in the *Denver* case, No. 393, Oct. Term, 1950, pp. 37-38, the Board distinguished *Denver* and *Langer* from *Ryan*, *Pure Oil*, *Schultz* and *Moore Dry Dock* entirely on the ground that in *Denver* and *Langer* "the evidence clearly established that the picketing was directed against neutral employers * * *" whereas in the other cases the signs carried by the pickets "clearly identified the dispute as being with the primary employer only," and that the unions in *Denver* and *Langer* "exceeded the bounds of allowable primary pressure" by "failing entirely to limit their picketing to the primary employers involved."

In both cases this Court approved the Board's rationale. In the *Denver* case the union contended that it was "engaged in a primary dispute with Doose & Lintner * * * [because] they sought simply to force Doose & Lintner to make the project an all-union job." This Court replied (341 U.S., at 687-688) that "The non-union employees were employees of Gould & Preisner;" the case was there-

fore entirely different from *Rice Milling* where the Union "sought merely to obtain its own recognition" from the operator of the mill against whom it was picketing, and also entirely different from the case which would have been presented "if, for example, Doose & Lintner had been doing all the electrical work on this project through its own non-union employees." Had that been the case, said the Court, the Union's demand on Doose & Lintner would have been primary, for Doose & Lintner then "could have replaced [the nonunion men] with union men and thus disposed of the dispute." Since, however, the Union's demand on Doose & Lintner bore no relation to conditions of employment or unionization of any of Doose & Lintner's employees, the Union had no primary dispute with Doose & Lintner and the strike against Doose & Lintner was necessarily secondary.

In *Langer* the Court disposed of the contention that the picketing was directed at Langer as follows: (341 U.S., at 699-700) "* * * a labor dispute had been pending for some time between Langer and the Electricians Union but no demands were made upon [Langer] directly * * * in connection with this project. There are no findings that the picketing was aimed at Langer [the primary employer] to force him to employ union workmen on this job. On the contrary, the findings demonstrate that the picketing was directed at Deltorto's [the carpentry subcontractor's] employees to induce them to strike and thus force Deltorto, the carpentry subcontractor, to force Giorgi, the general contractor, to terminate Langer's electrical subcontract."

The principal contention of the union in the *Denver* case was that because the general contractor and his subcontractors on a construction project are engaged in a common enterprise they are not to be considered as separate em-

ployers; that if one employer on a job is "unfair" the union is entitled to treat all employers on the job as "unfair," *i.e.*, treat the "job" as unfair, and strike against all. Holding that the independent contractor relationship is not excluded from the category of "doing business," which is protected by Section 8 (b)(4) (341 U.S., at 689, 690), this Court sustained the Board's conclusion that, on construction projects as elsewhere, a union may lawfully strike only against the employer with whom it is engaged in a primary dispute.

3. Application of the "An Object" Test to Secondary Strike Action and its Inducement.

Having thus found that the strike action and inducement in both *Denver* and *Langer* were directed against neutral employers, the Court rejected (341 U.S. at 688-689, 700) the unions' further contention that, since their ultimate object was "to make the project an all union job," they could not be said to have had the forbidden statutory object of forcing the general contractor to cease doing business with the non-union subcontractor. The Court pointed out in *Denver* that the only way in which the unions could attain their admitted objective was through forcing the general contractor in each case to terminate the subcontract and that, therefore, the secondary strike "must have included among its objects that of forcing [the general contractor] to terminate that subcontract." It is "sufficient," said the Court, 341 U.S. at 700 "that *an* objective of the picketing; although *not necessarily the only*" one, was to force termination of the uncompleted subcontracts.

In the *Langer* case, 341 U.S., at 703-705, the Court also held that non-coercive, as well as coercive, inducement, when used to bring about a "secondary boycott," is within

the reach of Section 8(b)(4). Peaceful picketing and related conduct is included in the ban whenever they are used to induce or encourage "secondary pressure." 341 U.S., at 705. The Court quoted and affirmed (341 U.S., at 704) the Board's holding in *United Brotherhood of Carpenters,* the *Wadsworth* case, that, it is the:

> "*objective* of the union's *secondary* [emphasis supplied] activities * * * and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision."

Therefore, when, in *Rice Milling,* 341 U.S. at 672, this Court said that it was the "object" of the Union's encouragement that is proscribed * * * rather than the means adopted to make it felt;" and in *Denver,* 341 U.S. at 687, that "we must first determine whether the strike in this case had a proscribed object," it was obviously referring to the union's purpose to exert secondary as distinguished from primary strike pressure, and not to whether the union was seeking to bring about a cessation of business between two employers through the inducement of neutral employees.

G. *Rice Milling* is Not Distiguishable From the Case at Bar.

Particularly in view of *Langer's* holding that Section 8(b)(4)(A) outlaws all picketing which is designed to bring about exertion of secondary pressure, we think the Sixth Circuit clearly erred when, in *United Brick & Clay Workers* v. *Deena Artware,* 198 F. 2d 637, 643, cert. den. 344 U.S. 897, it disposed of *Rice Milling* on the theory that the ruling:

"was based on the fact that the evidence failed to show that the Union sought *concerted* conduct on the part of the employees of the other employer."

Since two neutral employees were involved in the *Rice Milling* case, and the inducements were directed to them simultaneously, the inducement could not have been held lawful on the theory that no "concerted" work stoppage of any kind on the part of the neutral employees was being induced, and this Court did not suggest that *no* concerted action by the neutral employees was induced. What it held was, as we have seen, pp. 65-66, *supra*, that no concerted activity of the kind "the section proscribes" was induced, a very different thing. 341 U.S., at 670. Under the approach of the *Denver* and *Langer* cases, if Kaplan's premises had not been the situs of a primary dispute, the picket line and related inducements would have been held to have induced unlawful "concerted" action even though it affected only two employees of a neutral employer and even if it reached them at different times. *N.L.R.B.* v. *Local 11, Etc.*, 6 Cir., 242 F. 2d 932, 935. By the same token, the language of *Rice Milling* may not be read to mean that a primary picket line is not to be deemed to induce prohibited "concerted" action only insofar as its inducement not to cross reaches employees of neutral employers who approach the picket line individually or sporadically, but that the same picket line may be deemed to induce prohibited "concerted" action if employees of neutral employers approach the line regularly or in groups.

Courts other than the Sixth Circuit have interpreted this Court's finding of lack of prohibited "concerted" action in *Rice Milling* as resting on the primary nature of the work stoppage induced rather than on any lack of "concert" as such. Thus, in *Local 618, etc.* v. *N.L.R.B.*, 8 Cir.,

249 F. 2d 332, 334, 336, where, as in the instant case, the picket line induced a simultaneous work stoppage on the primary employer's premises by many employees of the neutral contractor who was engaged in a long term project there, the Court found that the picketing did not differ "materially from that prevailing in the Rice Milling Company case."

In *N.L.R.B.* v. *International Union of Brewery, Etc. Workers*, 10 Cir., 272 F. 2d 817, the union picketed the trucks of the primary employer, a brewery, as they stopped to make deliveries at various retail establishments. The union also appealed orally to employees of the retailers not to accept the deliveries. The court held (272 F. 2d, at 819-820), "encouragement of retail personnel to refuse to accept deliveries" from the primary employer was neither "intended or had the effect of invoking 'concerted' action any more than in *N.L.R.B.* v. *International Rice Milling Co.* • • •."

And in *Milwaukee Plywood Company* v. *N.L.R.B.*, decided December 20, 1960, the Seventh Circuit, 47 LRRM 2291, while finding the concerted activity passage "a bit puzzling," held that, as explained in *Denver*, the basis of the *Rice Milling* decision lies in the primary character of the activity induced.[29]

Congress recently demonstrated that it did not desire the distinction between lawful primary and unlawful secondary activity to rest on whether the action which neutral employees are induced to take is "concerted." Thus, on

---

[29] See also *N.L.R.B.* v. *Service Trade Chauffeurs, etc.*, 2 Cir., 191 F. 2d 65, 67; *Piezonki* v. *N.L.R.B.* 4 Cir., 219 F. 2d 879, 883; *Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 162, 191 F. 2d 642, 649, cert. den., 342 U.S. 869; *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591.

the one hand it amended the Act to outlaw inducement of even one employee of a neutral employer to take secondary action, and on the other, enacted the proviso, p. 46, *supra*, to assure that inducement of sympathetic primary action by neutral employees, not matter how "concerted" would not be made unlawful. See 105 Daily Cong. Rec. 15221, August 20, 1959, II Leg. Hist. L.M.R. & D.A. 1707. As illustrating the distinction between primary and secondary picketing that had become established "in existing law," and which it wished to preserve, the House Conference Report cited *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 *N.L.R.B.* 547.[30]

Thus, this case, in which nothing more was asked of the employees of the neutral contractors than that they refrain from crossing the picket line at the primary employer's premises cannot, as the court below thought, be distinguished from *Rice Milling* on the theory that it involved only "two employees" and therefore no "concerted" action.

In contrast with *Rice Milling* where the union picketed the Kaplan Mill with signs saying "This job is unfair * * *." 341 U.S., at 669, Petitioner here picketed with signs identifying General Electric as its sole adversary (R. 41; 133-134).

In both cases the picketing and other inducements were "directed beyond" the primary employer and his employees "toward the employees" of a neutral employer.

---

[30] The House Conference Report citation to the *Moore Dry Dock* case is 81 N.L.R.B. 1108, which is to another Moore Dry Dock case. It is manifest from the sense of the Report that the decision which the Report had in mind is the leading Board decision with respect to the problem under consideration, reported at 92 N.L.R.B. 547. Cf. Senator, now President, Kennedy's comment in 105 Daily Cong. Rec. 16415, September 3, 1959, II Leg. Hist. L.M.R. & D.A. 1433, which gives the correct citation.

341 U.S., at 671. Just as in *Rice Milling*, 341 U.S., at 671, "[t]here was no attempt by the union to induce any action by the employees of the neutral customer which would be more widespread * * *" than refusal to cross the picket line at the mill, so in this case there was no attempt to induce any action by employees of the contractors which would be more widespread than refusal to cross the picket line at Appliance Park. Here, just as in *Rice Milling*, *ibid.*, "There were no inducements or encouragements applied elsewhere than on the picket line." The picketing aside, petitioner did not engage in a strike against any neutral employer or encourage employees of any neutral to engage in concerted action "to force [their employer] to boycott" General Electric. *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 687-688.

In *Rice Milling*, the fact that the neutral employees were entering the picketed premises for a purpose related to Kaplan's business established that when the union sought to enlist their support, it was doing "no more than was * * * traditional in a primary strike." Thus, when the neutral employees approached the scene of the labor dispute, they inevitably became involved in the struggle, as supporters of one side or the other. If they crossed the picket line, they would be rendering economic assistance to Kaplan despite the strike and thereby aiding him to resist the Union's demand. If they refrained from crossing, they would be supporting the Union in its effort to exert economic pressure upon Kaplan to induce him to yield. The neutral employees were "enmeshed" in the labor dispute by virtue of their presence at the Kaplan premises for the purpose of doing business with him during the dispute. The inducement of the pickets was limited to that enmeshment.

So, in this case, the presence of the contractors' em-

ployees at Appliance Park related to General Electric's business. Indeed, the continued activity of the contractors' employees was of far more significance to General Electric's business during the strike than was the single trip of the customer's employees to obtain a load of rice or bran for their employer of significance to Kaplan's mill. If it was "traditional and permissible" to induce the customer's employees in *Rice Milling* to refrain from assisting Kaplan during the strike by taking rice or bran from his mill, *a fortiori,* it was "traditional and permissible" by peacefully picketing General Electric's premises to induce the contractors' employees to refrain from continuing to work there on major projects related to the operations of the struck plant in the very buildings and work areas which were the situs of the labor dispute. (R. 26-27; Cf. R. 16). The case at bar is even stronger than *Ryan* for in that case the neutral contractor's employees were engaged entirely in new construction, whereas here they were also performing work within the struck plant. Also in that case, as indicated in the dissent, the signs did not as clearly identify the primary employer as here. 85 N.L.R.B., at 420, n. 3. Certainly, unless this Court, despite its citation of *Ryan* with approval, intended that it should make a difference that 100 rather than 2 employees of neutral employers approach the picket line, pp. 51, 65, *supra, Rice Milling* governs this case.

II. THE BOARD'S NEW APPROACH DEFEATS THE INTENTION OF CONGRESS TO PROTECT TRADITIONAL PRIMARY STRIKE ACTION.

The Board's new approach is premised upon repudiation of the view that Congress intended Section 8(b)(4) to be read as though the word "secondary" modified the words "strike" and "concerted refusal," pp. 39-46, *supra*. In contrast to the original approach, under which the test supplied by the Section's language came into play "only in the event the union's * * * activities are found to be in furtherance of a *secondary boycott*" *(International Brotherhood of Teamsters, Etc. (Schultz Refrigerated Service)*, 87 N.L.R.B. 502, 504, note 3), under the new approach, as enunciated in *Local 618, Automotive Employees Union (Incorporated Oil Co.)*, 116 N.L.R.B. 1844, 1845:

> "The essence of the relevant proscription embodied in the language of Section 8(b)(4)(A) of the Act is to outlaw *any* inducement of employees to cease work where an object of such conduct is to interrupt the business carried on between their company and any other company. In *simple* terms, therefore, the burden of the complaint is sustained if it is shown that (1) the picketing * * * induced [the neutral employer's] employees to cease work, and (2) an object of the inducement was to compel [the neutral employer] to cease doing business with [the primary employer]." [Emphasis added.]

By looking to the language of the Section rather than to the legislative history for the "essence of the relevant proscription" the Board lifted the restraint upon construction imposed by Congress' intention to include only second-

ary strike action and to exempt traditional primary action from the ban. And by removing tradition as a guide to the content of the concept "primary action," the Board left itself free to inject its own policy judgment as to what union action should be held permissible.

A. In the Board's New View, Lawful Primary Pressure Is Only That Exerted Through the Primary Employer's Own Employees.

The Board now declares that the only legitimate object of picketing and related activity is to induce employees of the primary employer to cease work. It acknowledges that a union is "permitted to bring pressure on the primary employer through appeals to his own employees" *(Local 657, Teamsters (Southwestern Motor Transport, Inc.)*, 115 N.L.R.B. 981, 983). That acknowledgment is predicated on the finding that Section 13 guarantees employees the right to quit work. Thus, in *Local 618, Automotive Employees Union (Incorporated Oil Company)*, 116 N.L.R.B., 1844, 1847, set aside, 8 Cir., 249 F. 2d 332, a majority of the Board declared:

> "To the extent that picketing has as its object, and in fact induces employees of the struck employer to quit work and join their fellow workmen in concerted activity against their common employer, it is of course protected by Section 13 of the Act, which preserves the right to strike."

Consequently, the Board's view that a union can legitimately bring pressure to bear on a primary employer only through work stoppages of his own employees depends on reading Section 13 narrowly, as guaranteeing only the right

to quit work, and on disregarding completely Section 7, the proviso to Section 8(b)(4), the legislative history and the common law. As dissenting member Murdock put it (116 N.L.R.B. at 1854-1855):

> "the erroneous assumption that * * * the sole legitimate object [of primary picketing] is to induce primary employees to cease work * * * ignores elementary information as to traditional multiple purposes of primary picketing of which Congress must have been aware when it definitely protected primary picketing under the Act."

By thus restricting the economic pressure which a union can lawfully seek to bring to bear upon a primary employer to that which can be exerted through the primary employer's own employees, the Board brushed aside Congress' judgment that preservation of the right "to bring pressure to bear on offending employers" required that only *secondary* strike pressures be outlawed and *all primary* strike pressures be retained, and thereby opened to its own judgment the question which strike pressures should be tolerated. Upon this crucial supersedure of Congress' judgment with its own judgment, the Board erected its new approach.

From the assumption that the only legitimate object of picketing and related inducement is to appeal to employees and prospective employees of the primary employer it followed that (a) picketing and related inducement of employees of neutral employers is *ipso facto* illegal unless it accompanies and is incidental to an appeal to the primary employer's employees: "it is the concomitant inducement of * * * 'primary' employees that has * * * required inquiry as to the legality of picketing which, *prima facie*,

violates Section 8(b)(4)(A);" *Local 618* case, *supra*, 116 N.L.R.B. at 1847,[31] and (b) even when picketing or related inducement constitutes an appeal to the primary employer's employees, if it "also induces employees of neutral companies not to work, a question arises whether that conduct * * * runs afoul of the express prohibition of Section 8(b)(4)(A)." *Ibid.*

To resolve that question, the Board invoked the test which had been developed where picketing *directed against the primary employer* affected employees of neutral employers whose work *did not involve* the *primary employer*, namely, whether the impact of the picketing on employees of neutral employers was "inevitable and incidental," on the one hand, or intentional and avoidable on the other.[32] See pp. 57-61, *supra*. It made the shift, however, under the guise of continuing to apply the *Moore Dry Dock* tests. To do this, it read the tests as if they were predicated on its new narrow view of the legitimate scope of primary pressure. In *Local 657, Teamsters (Southwestern Motor Transport)*, 115 N.L.R.B. 981, 983, the Board said these tests were designed to "clearly establish that the picketing is directed against the *employees* of the primary employer and not the *employees* of the secondary employer," and

---

[31] "* * * [P]icketing away from the situs of the primary employer's operation, where none of his employees are working, must necessarily be directed only at some other employer's employees. * * *" *Local 657 Teamsters (Southwestern Motor Transport Inc.)*, 115 N.L.R.B. 981, 983; "In the absence of conduct directly aimed at the primary employees * * * there is no question of incidental as distinguished from direct inducement." *Amalgamated Meat Cutters (Swift and Co.)*, 113 N.L.R.B. 275, 278, enf'd as mod. 237 F. 2d 20, cert. den. 352 U.S. 1015; *Local 618* case, *supra*, 116 N.L.R.B. at 1847, 1848, note 7.

[32] *Local 657, Teamsters (Southwestern Motor Transport)*, 115 N.L.R.B. 981, 983-984; *International Brotherhood of Teamsters (Ready Mixed Concrete Company)*, 116 N.L.R.B. 461, 474.

that their application "is grounded on the reasonable, although rebuttable, presumption that a labor organization [which complies with them] is seeking *to appeal only to the primary employer's employees.*" [Emphasis supplied.][33] In *Retail Fruit & Vegetable Clerks Union (Crystal Palace Market)*, 116 N.L.R.B. 856, 858 enf'd, 9 Cir., 249 F. 2d 591, it said:

> "The gist of [the Moore Dry Dock] standards is that where picketing occurs at premises which are occupied jointly by primary and secondary employers, the timing and location of the picketing and the legends on the picket signs must be tailored to reach employees of the primary employer, rather than those of neutral employers. * * *
>
> "In developing and applying these standards, the controlling consideration has been to require that the picketing be so conducted as *to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees*" [emphasis in original.]

Without distinguishing between employees of neutrals whose work at the common situs benefits the primary em-

---

[33] From this it followed, *inter alia*, that the actual holding in *Moore Dry Dock* must have been predicated on the ground that the primary employer had no permanent place of business where the union could "picket the primary employer's employees for the purpose of putting pressure on the primary employer," and therefore in picketing at Moore's shipyard the Union was presumably seeking to appeal only to Samsoc's employees. *Local 657* case, *supra*, 115 N.L.R.B., at 983. The new majority was unembarrassed by the fact that a unanimous Board had earlier squarely held that in *Moore Dry Dock* the absence of an alternative place to picket was not a controlling factor. Note 27, *supra*.

ployer, and employees of neutrals whose work does not, these statements are, of course, untrue. And since the entire purpose of the *Moore Dry Dock* tests was to leave unions free intentionally and deliberately to induce non-performance by employees of neutral employers of work involving the primary employer at any "common situs," while outlawing inducement of non-performance only of work not involving the primary employer, the Board's failure to make that distinction rendered illegal the very primary conduct which the *Moore Dry Dock* standards had been designed to preserve.

Under the Board's new approach the test is no longer "against whom, the primary employer or a neutral employer, is the union's *boycott* directed?" Instead it is "toward whom, employees of the primary employer or employees of a neutral employer, is the union's *appeal* aimed." If that were the proper statutory test, it would necessarily apply as much to cases where the primary employer alone occupies the picketed premises as to cases where the picketed premises are occupied by the primary employer and one or more neutral employers. But, evidently because it recognized that so to apply it would result in proscribing acts of intentional inducement of employees of neutrals identical with those this Court held permissible in *Rice Milling*, the Board has exempted from application of the literal "an object" test picketing and related inducements not to cross a picket line at premises which, in the Board's view are "occupied solely by the primary employer." *Retail Fruit & Vegetable Clerks Union*, 116 N.L.R.B. 856, 860, note 10; *International Brotherhood of Teamsters (Milwaukee Plywood Company)*, 126 N.L.R.B. No. 80, affirmed, sub nom. *Milwaukee Plywood Company* v. *N.L.R.B.*, 7 Cir., No. 12,911, December 20, 1960; *International Brotherhood of Teamsters (Alexander Warehouse & Sales Co.)*, 128 N.L.R.B. No. 105.

In these cases, the Board not only does not apply the "an object" test to the picket line itself, but it treats appeals and pressures to respect the picket line deliberately and intentionally directed at employees of neutral employers, even at places remote from the picket line, as "inextricably interwoven elements of the primary picket line," and therefore permissible. *Ibid.*

On the other hand, where the union goes beyond inducements directed at honoring its primary picket line, and appeals to employees of neutral employers to refrain from handling the primary employer's goods or products at places other than the situs of the dispute, the Board applies the "an object" test *to the primary picket line itself. Local 175, Teamsters (McJunkin Corporation)*, 128 N.L.R.B. No. 57. The result is to make continuation of the primary picket line unlawful. Thus, by claiming latitude to apply or not apply the literal "an object" test, as it chooses, the Board is able to make the union's right to continue to exert pressure on the primary employer, even through primary picketing at premises occupied solely by him, dependent on the union's refraining from the exertion of any secondary pressure anywhere.

Another newly created criterion which the Board uses in deciding whether to apply the literal "an object" test to inducement directed to employees of a neutral employer not to cross a primary picket line is whether the neutral employer "is engaged in work for a relatively extended period of time" at the picketed premises. *Union de Trabajadores (Gonzales Chemical Industries)*, 128 N.L.R.B. No. 116. If so, then, in the Board's view, the premises are not occupied "solely" by the primary employer, and the Board therefore applies to the picketing the literal "an object" test, under which the union is required "to minimize its impact on neutral employers."

B. Restriction of Lawful Pressure to That Exerted Through the Primary Employer's Own Employees Severely Curtails Primary Picketing.

1. Proscription of Primary Picketing Where the Primary Employer Temporarily Removes His Employees From the Situs.

In *Local 618, Automotive Employees Union (Incorporated Oil Company)*, 116 N.L.R.B. 1844, 1847, the primary employer decided to rebuild one of his stations during the strike, and closed that station to the public until the job was completed. The union picketed with signs advertising its dispute with the owner of the station, thereby inducing employees of the construction contractor and employees of his suppliers to refuse to cross the line. The Board held that as there were no employees or prospective employees of the primary employer at the situs, the picketing could not have been intended to influence them to cease work, and as that is the only legitimate object of primary picketing, this picketing, insofar as it affected employees of neutral employers, was necessarily unlawful.

The Court of Appeals for the Eight Circuit reversed, holding that the legitimate object of primary picketing is to "publicize the union's difficulty with the employer," a purpose "much broader" than appealing to employees of the primary employer or even "discouraging replacement employees." *Local 618, Etc.* v. *N.L.R.B.*, 249 F. 2d 332, 337. It found that despite the absence of any of the primary employer's employees, the picketing was "at the business situs of the struck employer" and that even the *Moore Dry Dock* rules as originally understood were inapplicable. 249 F. 2d, at 335-336. It held (at pp. 337-338) that where "lawful picketing in support of a valid primary strike is in progress against the primary employer at the

employer's premises, the 'an object' test applied by the Board is too narrow," and observed that the Board's decision marked "a radical departure from the law as previously announced by the Board * * *" *Local 618, Etc.* v. *N.L.R.B.*, 249 F 2d, at 337.[34]

In the *Local 618* case the absence of employees of the primary employer from the picketed premises resulted from the employer's closing of the station to the public during the remodeling job. In the next case, the employer did not go even so far as to interrupt his normal business, he merely removed his non-supervisory employees temporarily from the scene. In *Seafarers International Union, Etc.* (*Salt Dome Production Company*), 119 N.L.R.B. 1638, just as in *Moore Dry Dock*, the primary employer had brought his vessel to the shipyard of a neutral employer for overhaul and repair. After the union began to picket him at the entrance to the shipyard in accordance with *Moore Dry Dock* standards, the primary employer removed all of his non-supervisory employees from the vessel. The Board found that by continuing to picket the shipyard thereafter the union violated Section 8 (b)(4)(A).

The Court of Appeals reversed, holding that the union was entitled as a matter of law to appeal to employees of neutral employers to boycott the primary employer's ship at the shipyard. *Seafarers International Union, Etc.* v. *N.L.R.B.*, D.C. Cir., 265 F 2d 585.

The Court of Appeals noted that when picketing takes place at the premises of a neutral who is only in part performing services for the primary employer, and in part doing work wholly unrelated to the primary, the neutral may not lawfully be subjected to pressures beyond those which he would feel if he came to the premises of

---

[34] Cf. *Alpert* v. *United Steelworkers of America; Etc.*, D.C. Mass., 141 F. Supp. 447, 452.

the primary employer to perform his services. 265 F. 2d at 591. The only pressure which a neutral feels in consequence of an appeal to his employees not to cross the picket line at the primary employer's plant is that which results from his inability to complete the services which he is to perform for the primary employer. When the primary employer comes to the neutral's premises, however, and the neutral employer is only in part working for the primary employer, a general appeal not to cross the picket line would amount to inducement of the neutral's employees to engage in a general strike against their own employer, and not merely to stop performing services for the primary.

Thus, the court held, the question is not whether primary employees are present or absent, and not to whom the picketed premises belong, but rather whether the neutral is being subjected to pressures beyond those which are "felt by servicers or suppliers under the most ordinary circumstances when a customer of theirs is picketed" (265 F. 2d, at 591) at his own plant and their employees are asked not to cross the picket line to make their delivery or engage in some other service for the primary employer. Finding that the union did not intend to enlarge the area of dispute beyond such appeals, the court held the picketing legal.

In addition, the court pointed out, it would be intolerable to approve the Board's rule under which "an employer can transform a picket line from a legal to an illegal one merely by moving his non-supervisory employees away." *Seafarers International Union, etc.* v. *N.L.R.B.*, D.C. Cir., 265 F. 2d 585, 590. Under the Board's approach, the court observed (*ibid.*):

> "employees [could] be held to lose the right to picket peaceably if all employees go out on strike so that

none are left on the employer's property. * * * the primary employer should not have the power to prevent picketing by merely turning out all his employees. * * * the presence or absence of employees of the primary employer on the premises is not a critical factor in the legality of a picket line."

2. Proscription of Primary Picketing at Places Where Picketing is Not "Necessary" to Enable the Union to Appeal to the Employees of the Primary Employer Who Are Involved in the Dispute.

The Board's new approach led not merely to prohibiting picketing at places where no employees of the primary employer were present, but also to its prohibition at places where, in the Board's view, picketing was not "necessary" to enable the union "adequately" to publicize its appeal to those employees who were involved in the primary dispute.

In *General Drivers, Local 968* (*Otis Massey Co.*), 109 N.L.R.B. 275, 279-280, the Board held that picketing directed against the primary employer at construction sites where he was engaged in business, and where others of his employees regularly worked, was secondary and illegal because his truck drivers and warehousemen, who were alone involved in the primary dispute, were employed at his warehouse and not at the construction sites. The union could "adequately" appeal to those employees, said the Board, at the warehouse, and it should not be permitted unnecessarily to enmesh others by picketing at the construction sites. The Fifth Circuit denied enforcement (*N.L.R.B.* v. *General Drivers, Local 968*, 225 F. 2d 205, cert. den., 350 U.S. 914), holding that the Board's rule would prevent "other employees of that same primary employer from exercising their statutory right under Section 7 * * *

to make common cause with their coworkers." The Court further held that to sanction the Board's attempt to predicate the legality of picketing at any particular situs of the dispute on a determination whether picketing there was necessary to enable the union "adequately" to publicize its dispute would mean that "under the guise of fact finding" the Board could "substitute Board inferences * * * based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of lawfulness of the end or objective sought * * *." 225 F. 2d, at 209-210.

The extent to which the Board's "own judgment as to the propriety and adequacy of the means employed in a labor dispute," is, under its new test, the touchstone for determining legality under Section 8(b)(4)(A) is reflected by its establishment of a "fifth condition" for picketing at a common situs in addition to the four *Moore Dry Dock* rules. The "fifth condition" is that the primary employer have no permanent place of business where "the union could publicize its dispute." *International Brotherhood of Teamsters (Ready Mixed Concrete Co.)*, 116 N.L.R.B. 461, 473.

The rationale of the "fifth condition" is that if the union can "adequately" appeal to employees of the primary employer at a place where only the primary employer is engaged in business, the union is not "justified" in picketing at other locations, where other employers as well as the primary employer are found. To picket at a "common situs" in such circumstances, said the Board, is to reveal that the Union's purpose is to enlist the aid of neutral employees, and thus to fail to "minimize the impact" of the dispute on neutral employers.[35]

[35] This explanation was not advanced by the Board in the first case in which it invoked the requirement, *Brewery & Beverage*

In *Local 657, Teamsters (Southwestern Motor Transport)*, 115 N.L.R.B. 981, 984, the Board said:

> "a union which can direct its inducements to the primary employer's employees at the primary employer's premises, does not seek to accomplish any more with respect to the same employees at the premises of some other employer. Consequently the only reasonable inference in such a situation is that inducements which are ostensibly directed at the primary employer's employees are in fact directed at the employees of secondary employers."

In the *Ready Mixed Concrete* case, 116 N.L.R.B. 461, 474, the Board explained:

> "Where * * * a primary employer has no fixed location * * * where its employees may adequately be reached by picketing * * * [there is] sufficient justification for permitting picketing of the primary employer at the location where the travelling work situs comes to rest, and any involvement of neutral employers and their employees may then be appropriately viewed as but a necessary incidental effect * * * But where * * * the [primary] employer has a fixed place of business * * * at which its employees can be * * *.

Drivers, Local 67 (Washington Coca Cola), 107 N.L.R.B. 299, enf'd 95 U.S. App. D.C. 117, 220 F. 2d 380. As the Second Circuit recently observed in *N.L.R.B. v. Local 294, Teamsters*, No. 53, decided Nov. 10, 1960, 47 LRRM 2085, 2088, note 3:

> "Washington Coca Cola proceeds rather on the basis of a legal conclusion, which rather clearly goes beyond the authorities, that 'After 6 years of Board and court construction of Section 8(b)(4)(A) of the Act, the fundamental principle has been established that this section proscribes picketing at the separate premises of employers who are not a party to the picketing union's primary dispute.' 107 N.L.R.B. at 302."

approached • • • the scales tip the other way. For now, the only detriment the Union would suffer by forbidding extension of its picketing to customer's job sites while deliveries are being made would be the foreclosure of what would otherwise be an added opportunity to enlist the aid of others not directly concerned with its dispute."

The "fifth condition" doctrine has been firmly rejected by the courts. *Sales Drivers, Helpers, etc., Local 859* v. *N.L.R.B.*, 97 App. D.C. 173, 229 F. 2d 514, cert. den., 351 U.S. 972; *N.L.R.B.* v. *International Union of United Brewery, Etc. Workers*, 10 Cir., 272 F. 2d 817; *N.L.R.B.* v. *International Brotherhood of Teamsters, Local 294*, 2 Cir., — F. 2d —, decided Nov. 10, 1960, 47 LRRM 2085. As Judge Friendly put it, speaking for the Second Circuit in the last cited case,

> "violation of the fifth criterion shows only that the secondary picketing had an objective other than persuading the primary employees, not that the picketing necessarily had the particular objective which § 8(b)(4)(A) forbids."

3. Proscription of Primary Picketing at a Separate Gate to the Primary Premises and at a Common Entrance Not in Current Use by Primary Employees.

Even the irrelevant excuses which the Board offered for immunizing the primary employer against picketing pressure directed against him in the foregoing cases are lacking in the "separate gate" cases, of which this was the first. In this case, unlike *Incorporated Oil*, the primary employer did not during the labor dispute close down the enterprise being picketed. General Electric continued to operate and throughout the strike contested with the union for the

sympathetic support and patronage of all persons who did business with it at Appliance Park (R. 137). Unlike *Salt Dome*, the primary employer did not remove his non-supervisory employees from the situs of the dispute; here a large number of General Electric employees in the bargaining unit affected by the strike continued to work, and General Electric was actively inducing others to return. Unlike *Otis Massey*, the union did not picket at an enterprise of the primary employer remote from the normal work area of the employees involved in the primary dispute. Unlike *Washington Coca Cola* and the other "fifth condition" cases, the Petitioner did not follow General Electric trucks from Appliance Park to, and picket at, the premises of customers to whom they were making deliveries. It restricted its picketing to General Electric's "principal place of business," unquestionably the situs of the labor dispute.

The widespread potential of the Board's new doctrine for enabling primary employers to escape a substantial portion of the economic pressure which traditionally accompanies a primary strike was revealed even more clearly by the Board decisions which followed this case. While in the instant case the record shows that the separate gate for use of contractors and their suppliers exclusively was established long before this strike, in the next case, *Local No. 36, International Chemical Workers (Virginia-Carolina Chemical Corp.)*, 126 N.L.R.B. No. 117, the Board held illegal picketing at a separate gate which was cut by the primary employer after the strike against him began.[36] In its latest decision, the Board has now held that to escape

---

[36] Accord: *United Steelworkers of America (Phelps-Dodge Refining Corporation)*, 126 N.L.R.B. No. 168 (separate gate opened by primary employer few days before, and in contemplation of, potential strike against him).

some of the economic pressure of peaceful picketing directed against him at his own premises, a struck employer need not even go so far as to open a separate gate or entrance. In *Union de Trabajadores (Gonzales Chemical Industries)*, 128 N.L.R.B. No. 116, employees of a general contractor who was engaged in construction work for the struck employer entered the plant premises through the very gate or entrance that was regularly used by the employees involved in the strike. The only difference was that the contractor's employees reported for work "at different times and in groups separate" from the primary employer's employees, the former "wearing green safety helmets" and the latter "wearing white ones." The Board held that by picketing at the plant entrance at times when the contractor's employees were scheduled to enter, and by appealing to them orally to respect the picket line, the union violated Section 8(b)(4).

C. The Board's Rationale Is Untenable

1. The "Title to Property" Straw Man.

In the *Gonzales* case, *supra*, slip op. pp. 3-4, the Board attempted to justify its application of the *Moore Dry Dock* tests as refocused and redefined to picketing designed to induce employees of neutral employers not to assist the primary employer by performing work or services for him at the primary employer's own premises on the theory that to do otherwise would make "the legality of picketing * * * depend on where the title to the property was vested." But the Board's assumption is false that the reason its results differ from the results reached formerly on identical facts is that in the past, application of the *Moore Dry Dock* tests depended on "title to property." The reason different results were reached is that the substance

of the test was different. Applicability of the test depended only on whether at the picketed situs employees of neutral employers were engaged in performing work or services which, in whole or in part, did not relate to or directly and immediately benefit the primary employer. That appears not only from the cases discussed above, but from the very cases upon which the Board relies to justify its new approach.

In the case at bar the Board cited as authority *Atomic Projects & Production Workers (Associated General Contractors of America)*, 120 N.L.R.B. 400, enforced sub nom. *Office Employees International Union* v. *N.L.R.B.*, D.C. Cir. 262 F. 2d 931. (R 42, note 7) There, the primary employer, the Sandia Corporation, occupied and performed work for the Atomic Energy Commission in various buildings owned by AEC at the Sandia Base, a large tract of land in Albuquerque, New Mexico. Independent contractors were simultaneously engaged in constructing other buildings on the base under contract with AEC and the United States Corps of Army Engineers. When notified by the union of its labor dispute with Sandia and the projected picketing of the base, the Commanding Officer offered to, and did, open a separate gate to the base, not normally used, for the exclusive use of the building contractors and their suppliers during the strike. When the union picketed this separate gate, thereby inducing employees of the building contractors to cease work on the building projects they were performing for AEC and the Engineers, the Board found, and the Court of Appeals agreed, that the union had violated Section 8(b)(4)(A).

The *Associated General Contractors'* case is a classic example of the third category of "common situs" cases discussed at pp. 57-61, above, for neutral employees at the common situs were not performing *any* work or service

involving the primary employer; they were performing their work and services entirely for the AEC and the Army Engineers, and the latter were strangers to the dispute between Sandia and the Union. That any intentional or deliberate inducement of the employees of the contractors in that case to stop work was a violation of Section 8(b)(4)(A) followed *a fortiori* from this Court's *Denver* and *Langer* decisions, for here the offending employer and the neutral employer were not even engaged on the same construction project.

In *Gonzales*, the Board cited and relied on *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market)*, 116 N.L.R.B. 856, enforced, sub nom. *Retail Fruit & Veg. Clerks U. v. N.L.R.B.*, 9 Cir, 249 F. 2d 591. There the primary employers were Long and a number of other employers who operated independent stores or stands handling different products in a large shopping center building known as Crystal Palace Market. These primary employers, all represented by an Association for purposes of collective bargaining, were engaged in a dispute with Clerks Union No. 648. The neutral employers were a number of other employers, who operated other independent stores in the market. Some of them were not involved in the dispute because they were not represented by the Association; others were not involved because their employees were represented by another local of the Clerks Union, with whom a different employer Association, which represented these market operators, had a current contract. Long owned the market building and leased the stores to the various employers under a lease calling for Long to receive as rent a percentage of the tenants' receipts over a fixed minimum.

When the dispute arose Long gave the union permission to picket within the market in front each of the in-

dividual stands involved in the dispute. The union rejected the offer and instead picketed in front of virtually all of the entrances to the market. By this picketing and further, by direct appeals through its sister local to employees of the neutrals, it induced them to stop all work. On these facts the Court of Appeals sustained the conclusion that the neutral store and stall operators were independent entrepreneurs engaged in businesses separate and distinct from Long's, and that inducement of their employees to engage in a concerted stoppage of work "against their own employer" (249 F. 2d 591, 600), for the purpose of influencing the outcome of the union's dispute with Long and the other primary employers, was a secondary boycott.

As the Board says, the Court of Appeals in *Crystal Palace* did hold that "title to the property" is not decisive in determining whether a union involved in a labor dispute can properly seek to induce employees of neutral employers employed there to cease work. 249 F. 2d, at 596. But the decisive factor in the *Crystal Palace* case was that the services and work which the neutral employees were performing and which they were induced to stop were not being rendered to or for Long or any of the other primary employers, and consequently did not involve them directly. The fact that these employees were performing their work on premises which their employers occupied on lease from Long, no more supplied the missing nexus between their work and Long than could the fact in the *Denver* case that the employees of the neutral employers and of the primary employer were working on a common project at the same site supply the missing nexus between the work of the general contractor's employees and the primary electrical subcontractor. Similarly, the fact that under the lease arrangement operation of the neutrals' stalls during the strike would produce revenue for Long,

could no more justify disregard of the neutrals' status as independent entrepreneurs than could the economic interrelationship between contractor and subcontractor justify in *Denver* and *Langer* treating separate employers as if they were one and the same. Consequently, just as in *Denver*, the union was not entitled by picketing or otherwise to call or induce a strike of employees of the general contractor or subcontractors who were not performing work or services for the primary employer, so in *Crystal Palace*, the unions were not entitled by picketing or otherwise to call a strike of employees of the neutral stall operators.

In enforcing the Board's decision in *Crystal Palace*, the Court of Appeals did not adopt the Board's rationale and it specifically disapproved the majority's repudiation of *Ryan*. 249 F. 2d at 596 and note 8.[37]

In *Gonzales* the Board also cited *Local Union No. 55, and Carpenters' District Council (Professional and Business Men's Life Insurance Company)*, 108 N.L.R.B. 363, enf'd. sub nom. *N.L.R.B.* v *Local Union No. 55*, 10 Cir., 218 F. 2d 226. In that case, employees of neutral subcontractors were engaged, at premises owned by the Life Insurance Company, the primary employer, in work on a building for that company. In addition, the insurance

[37] While the court correctly described the *Moore Dry Dock* standards as "evidentiary tests to aid in determining whether common-situs picketing is primary and lawful or secondary and unlawful" (249 F. 2d, at 596-597), this formulation is not complete for, as originally conceived, the standards marked the boundaries within which a union was entitled to exercise its statutory right to picket the primary employer at a common situs, and thereby reflected the degree to which, in the balancing process, the Board had diminished "the right of * * * the union to picket" in deference to the right of secondary employers, to the extent they were not serving the primary employer at the situs, "to be free from picketing." *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 549.

company acted as its own general contractor on the job. The key to the court's finding of violation, however, lies in the nature of the action which the union took against the subcontractors. Thus, it did not limit the scope of its inducement of the subcontractors' employees to work on that project, or to work involving the insurance company; it induced employees of the subcontractors to strike against the subcontractors *generally, everywhere,* for the purpose of forcing the subcontractors to cease doing business with the insurance company, a violation equivalent to that which would have existed if the pickets in *Rice Milling* had sought to provoke a strike against Sales and Service House, pp. 65-66, *supra.*

Thus, the court found (218 F. 2d, at 228) that the unions representing the subcontractors' employees "had long been disturbed by the fact that union members had been working on projects of the insurance company along with nonunion men." The union "took steps to correct such practice by exerting pressure" on the "subcontractors." It did this by threatening the subcontractors that their union member employees would be fined and expelled from the union, and *"the rest of* [their] *employees would be taken away"* if the subcontractors "continued to work [their] men on nonunion projects" [emphasis supplied]. Thereafter, the union placed the insurance company on an "unfair list" and picketed its construction job with signs reading "Working Conditions on this Job Unfair to Carpenters' District Council."

The court found (218 F. 2d, at 231), that since "the picketing signs were not directed at the primary employer alone, but * * * at the project, at which secondary employers were also working," and in view of "the pressure that had theretofore been directed at the secondary employers," it was reasonable to conclude that the picketing

was designed "to create pressures that would cause the subcontractors to stop work on their subcontracts." If this is read as meaning "pressures against the subcontractors more widespread than those flowing from refusal of their employees to work on the Insurance Company job," it is consistent with the holding of this Court in *Rice Milling*, and the decision by no means supports the Board's position. If it is construed, however, as meaning that the union is not entitled to picket the project with signs advertising its dispute with the insurance company or otherwise induce employees of the contractors not to work on the Company's project, it is incompatible not only with *Rice Milling* but with the implications of *Denver* and *Langer* as well.

The Board has also relied upon *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 6 Cir., 198 F. 2d 637, cert. den. 344 U.S. 897, which, in its decision in the *Crystal Palace* case, *supra*, 116 N.L.R.B. at 859, the Board characterized as holding that "the fact that picketing was limited to a construction site owned by the primary employer [did not preclude] as a matter of law, a finding that the picketing violated Section 8(b)(4)(A)."[38]

While of course, as we have seen, title to property is not controlling, the fact that the construction work in *Deena* was being performed *for the primary employer* at his premises should have precluded a finding that the picketing was directed "against the general contractors" rather than "against Deena" in the absence of independent evidence of more widespread inducements. In its own Section 8(b)(4)(A) decision, on the same facts, the Board, citing *Pure Oil*, held that since "the record contains no evidence of secondary picketing," the picketing of Deena at its

[38] In fact that case arose not under Section 8 (b)(4) but under Section 303.

premises was primary "as a matter of law." *Deena Artware, Inc*, 86 N.L.R.B. 732, 735, enforced, sub nom. *N.L.R.B.* v. *Deena Artware*, 6 Cir., 198 F 2d 645, 653, cert. den., 345 U.S. 906.[39]

2. Distinction in Terms of the Duration of the Neutral Employer's Presence at the Situs Is Without Justification.

The Board's attempt to determine the legality or illegality of intentional inducement of the employees of the neutral employer to refrain from performing work directly involving and benefiting the primary employer, on the basis of the duration of the neutral employer's presence at the situs of the labor dispute is wholly without justification. The Board's opinion in *Gonzales* suggests that it constitutes an attempt to capitalize on the "happen to approach" phrase wrenched out from context from this Court's opinion in *Rice Milling*. See pp. 66, 70-73, *supra*.

If we attribute to this distinction the function of immunizing against the economic consequences of primary strike pressure those neutral employers who are most seriously affected but not neutral employers less substantially affected, the distinction is not only lacking in statutory foundation, but is also wide of the mark. The distributor of a single product who cannot obtain deliveries of the product because his employees will not cross a picket line at the manufacturer's plant may suffer injury more severe

---

[39] In *N.L.R.B.* v. *Associated Musicians*, 2 Cir., 226 F. 2d 900, cert. den., 351 U.S. 962, where the court held that the right to conduct a primary strike had not been "inordinately infringed by the prohibition * * *" of picketing at the Stadium and Rink from which a few of the primary employer's employees sometimes broadcast, *none* of the employees of the neutral employers at the Stadium or Rink performed any work or service for the primary employer. In addition, the court found that "neither the Stadium nor the Rink was at any time the situs of the dispute between the union and Gotham." 226 F. 2d at 905.

than contractors whose employees will not cross a picket line to work on the struck employer's premises. The contractor can usually bid and work on other jobs more easily than the distributor can switch his product line.

From the point of view of the primary employer, likewise, the continuation during the strike of his long term projects cannot rationally be distinguished from continuation of his shipments and deliveries by employers with whom he is engaged in business regularly and continuously. Employees of such employers, like employees of the contractors, come to his premises regularly and predictably over long periods. The only difference is the duration of their stay each time. What rational or economic difference does that make? What would the Board say to the case of a machine repairman, called in to perform work requiring a whole day, two days, a week? Could the primary employer insulate such employees from picketing by having them pass through a separate gate? Where could the line be drawn, and why?

From the point of view of the unions the duration of the neutral employees' stay is equally irrelevant. Their interest, and their right, under the law is to disrupt by peaceful picketing and comparable publicity all of the primary employer's business relationships at the struck plant. Neither the nature of the business which the neutral employers are doing with the primary employer, nor its extent, nor its duration, is relevant in determining, from their point of view, whether it is of benefit to the struck employer and therefore an appropriate target of primary strike pressure. To remove permanent or long standing business relationships from the reach of such pressure is simply, *pro tanto*, to diminish the union's power to exert pressure on the primary employer in support of their demands, and thereby impair the right to strike.

D. The Board Has Usurped the Function of Congress.

The Board says that it merely seeks "to accommodate" in "a reasonable and practicable manner in common situs cases" the "dual congressional objectives * * *." *Gonzales* case, slip op. p. 3. It claims that under its new approach, "without unnecessarily enmeshing neutral employers in the disputes of others, the union is left free under *Moore Dry Dock* criteria effectively to exert its pressure on the employer with whom it is in dispute."

But the interests which the Board is now undertaking to weigh and reconcile are not those which Congress left for it to balance. Cf. *N.L.R.B.* v. *Truck Drivers Local Union, No. 449*, 353 U.S. 87, 96. What the Board initially did, and what this Court approved as being consistent with Congress' policy, was to refine the application in common situs cases of the policy of protecting neutral employers against secondary strike pressures; it did not seek to immunize them against the impact of primary strike action which is incidental to and stems from the neutral's business enmeshment with the primary employer at the scene of the dispute. The Board's approach acknowledged that because Congress precluded only "a union's resort to the secondary boycott" (*N.L.R.B. v. Drivers Local Union* 639, 362 U.S. 274, 283), the claim of "bystanders to be free of harm" cannot be a claim to be free of all harm but only of harm from "so-called 'secondary boycotts * * *.'" *N.L.R.B.* v. *Service Trade Chauffeurs, Etc.* 2 Cir., 191 F.2d 65, 67. Therefore "a union may lawfully inflict harm on a neutral employer, without violating § 8(b)(4), so long as the harm is merely incidental to a traditionally lawful primary strike, conducted at the place where the primary employer does business." *Ibid.* "Congress did not intend to forbid picketing" directed solely against the primary employer, whether at a primary employer's premises, or at the prem-

ises of a neutral where those premises are "the situs of the dispute * * * [n]o matter how great the pressure on a neutral employer may be * * *." *Seafarers' International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F.2d 585, 591. "Mere incidental effect on the secondary employer is not enough to constitute a secondary boycott." *N.L.R.B.* v. *Local Union No. 55*, 10 Cir., 218 F.2d 226, 230. "* * * [P]eaceful picketing [even] upon common premises, directed solely against the primary employer with whom a labor dispute exists, is * * * lawful under the Act, and * * * any adverse effect upon secondary neutral employers must necessarily be viewed as incidental to the lawful exercise of that statutory right." *N.L.R.B.* v. *General Drivers, Etc.*, 5 Cir., 225 F.2d 205, 210, cert. denied, 350 U.S. 914.

Under the Board's new approach, however, it draws a line of demarcation between what it considers effective strike pressure on the one hand, and the interest of neutrals in avoiding all repercussions of strike action on the other. This reverses Congress' judgments that (a) the consequences of primary strike action must necessarily be endured, and (b) neutral employers should be protected against the impact of secondary, not primary, pressure. There is not a scintilla of suggestion that Congress authorized the Board to inquire, as it does under its new test, how much primary activity is adequate in order that a union may "effectively * * * exert * * *pressures on the employer with whom it is in dispute?" "Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure that the question has been asked." *N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477, 499-500. To ask that question is not only to misapply *Moore Dry Dock* rules, it is to usurp Congress' province to decide

where, in the area of economic conflict, the line between the permissible and the unlawful should be drawn. What masquerades as an attempt to effectuate Congress' dual objectives is actually an essay in effectuation by the Board of a new economic policy of its own.

Here, as in *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, 363, to sustain the Board's position would be to permit the Board under the "guise of administration to put limitations in the statute not placed there by Congress." It is as true in this case as in that one that "the Board's policy * * * would make an unfair labor practice out of that which is authorized by the Act * * *" and thereby defeat Congress' policy. *Ibid.* Just as Congress did not allow the Board, under the "guise of determining good or bad faith in negotiations" to "regulate what economic weapons a party might summon to its aid" (*N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477, 490, so did it not allow the Board, under the guise of distinguishing between primary and secondary boycotts, to outlaw primary picketing because it thinks its pressure on neutrals is too severe, or "unnecessary." The Board cannot by proscribing economic weapons "minimize the pressure on the other party," or introduce "some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons * * *" *Ibid.* The statute does not contain "a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." (*Ibid.*) Just as the Board was not allowed, under the guise of administration, to "sit in judgment upon and to condemn" picketing for recognition by a minority union because it disapproved of the economic pressures so generated (*N.L.R.B.* v. *Drivers Local Union 639*, 362 U.S. 274, 282), so must it not be allowed to sit in judgment upon

and to condemn primary picketing where it disapproves of its economic consequences.

As in *N.L.R.B.* v. *Drivers Local Union 639*, 362 U.S. at 291 where this Court observed that the Board's initial decisions on the question there at issue "gave a sounder construction to Section 8(b)(1)(A) than the Board's construction in the present case," so did the Board's decision in *Ryan* give a sounder construction to Section 8(b)(4)(A) than does its decision here. In the *Local 639* case the Board may have felt itself at liberty to reverse its field, for its prior decisions had not been approved by this Court as reflecting a sound approach to the statute. But in view of this Court's citations of *Ryan*, *Pure Oil* and *Schultz* with approval, pp. 21, 65, 75, *supra*, the same cannot be said for it here. In this area, the Board has undertaken not only to reverse its own prior decisions, but the views of this Court as well.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

BENJAMIN C. SIGAL,
EDMOND F. ROVNER,
DAVID S. DAVIDSON,
1126 16th Street, N.W.
Washington 6, D. C.

MOZART G. RATNER,
1411 K. Street, N.W.
Washington 5, D. C.

Attorneys for Petitioner.

HERBERT L. SEGAL,
403 Republic Building,
Louisville, Kentucky

Of Counsel

(3745-7)

FILE COPY

OFFICE SUPREME COURT, U.S.
FILED
JAN
JAMES R.

No. 321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761 INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA AND INTERNATIONAL CHEMICAL WORKERS UNION, *Amici Curiae*

DAVID E. FELLER
JERRY D. ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
Attorneys for United Steelworkers of America and International Chemical Workers Union

TABLE OF CONTENTS

	Page
INTRODUCTION STATEMENT	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. Section 8(b)(4) Does Not Prohibit Picketing or Other Action Designed to Induce Employees of Other Employers to Refuse to Work at Premises Where Employees of a Primary Employer Are Engaged in a Lawful Primary Strike	7
II. There Is No Basis for Distinguishing This Case From Any Other Case of Primary Picketing	18
III. The Recent Amendments to Section 8(b)(4) Make It Clear That the Picketing in This Case Was Not an Unfair Labor Practice Under the Old Law and Would Not Be One Under the Amended Act	29
CONCLUSION	36

TABLE OF CITATIONS

Cases

Atomic Projects and Production Workers (Associated General Contractors), 120 N.L.R.B. 400 (1958), *enf'd per curiam*, 262 F. 2d 931 (D.C. Cir. 1959)	24
Brotherhood of Painters, 110 N.L.R.B. 455 (1954)	22
DiGiorgio Fruit Corp. v. N.L.R.B., 191 F. 2d 642 (D.C. Cir. 1951); *cert. denied*, 342 U.S. 869 (1951)	15
International B'hd of Elec. Workers v. N.L.R.B., 341 U.S. 694 (1951)	15, 21
International B'hd of Teamsters (Alexander Warehouse Co.), 128 N.L.R.B. No. 105, 46 L.R.R.M. 1409 (Aug. 25, 1960)	18
International Organization of Masters, Mates & Pilots, 125 N.L.R.B. No. 19, 45 L.R.R.M. 1059 (November 12, 1959)	17
Local No. 36, Int'l Chemical Workers (Virginia-Carolina Chemical Corp.), 126 N.L.R.B. No. 117, 45 L.R.R.M. 1407 (Mar. 2, 1960), *now pending on review in the D. C. Circuit, No. 15631*	1, 2, 13, 20
Local 618, Automotive Employees v. N.L.R.B, 249 F. 2d 332 (8th Cir. 1957)	16
Local 1976, United B'hd of Carpenters v. N.L.R.B. 357 U.S. 93 (1958)	8
Milwaukee Plywood Co. v. N.L.R.B., 47 L.R.R.M. 2291 (7th Cir. December 20, 1960)	16
N.L.R.B. v. Denver Bldg. Trades Council, 341 U.S. 675 (1951)	8, 23

Page

N.L.R.B. v. International Rice Milling Co., 341 U.S. 665 (1951) 3, 11
N.L.R.B. v. Service Trade Chauffeurs, 191 F. 2d 65 (2d Cir. 1951) 22
Newspaper Deliverers' Union (Interborough News Co.), 90 N.L.R.B. 2135 (1950) 11, 32
Oil Workers Int'l Union (Pure Oil Co.), 84 N.L.R.B. 315 (1949) 9, 32
Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421 (1855) 29
Retail Fruit & Vegetable Clerks v. N.L.R.B., F. 2d 591 (9th Cir. 1957) 22
Sailor's Union (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950) .. 5, 21, 22, 25, 27, 31
Seafarers Int'l Union v. N.L.R.B., 265 F. 2d 585 (D.C. Cir. 1959) 27
SEC v. Chenery Corp., 318 U.S. 80 (1943) 23
United Electrical & Machine Workers (Ryan Constr. Co.), 85 N.L.R.B. 417 (1949) 13
Union de Trabajadores (Gonzales Chemical Industries, Inc.), 128 N.L.R.B. No. 116, 46 L.R.R.M. 1423 (August 26, 1960) .. 27
United Steelworkers of America (Phelps Dodge Refining Corp.), 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (March 31, 1960), *now pending on review in the 2d Circuit No. 26252* ... 1, 20, 23

Statutes

National Labor Relations Act
§ 7, 29, U.S.C. § 157 7
§ 8(b)(4), 29 U.S.C. § 158(b)(4) (1958) 2-14, 16, 17, 19, 21, 26, 29, 31-36
§ 8(b)(4), 29 U.S.C. § 158(b)(4) (Supp. I, 1959) 30
§ 8(b)(7), 29 U.S.C. § 158(b)(7) (Supp. I, 1959) 34
§ 13, 29 U.S.C. § 163 12
Pub. Law No. 86-257, § 707, 73 Stat. 546 29

Miscellaneous

93 Cong. Rec. 4201 (April 29, 1947) (Remarks of Senator Taft) 8
Cox, Law and the National Labor Policy 32, 34 (1960) 35
Eighteenth Ann. Rep. of the N.L.R.B. (1953) 15
H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959) 32
H.R. Rep. No. 1147, 86th Cong., 1st Sess. (1959) 31
Sixteenth Ann. Rep. of the N.L.R.B. (1951) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 321

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA AND INTERNATIONAL CHEMICAL WORKERS UNION, *Amici Curiae*

INTRODUCTORY STATEMENT

The interest of the United Steelworkers of America and the International Chemical Workers Union in this case can be simply stated. Each has pending, in one of the courts of appeals, a case involving facts substantially identical to those involved here. *United Steelworkers of America (Phelps Dodge Refining Corp.)*, 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (Mar. 31, 1960) *now pending on review in the 2d Circuit*, No. 26252; *Local 36, Int'l Chemical Workers (Virginia-Carolina Chemical Corp.)* 126 N.L.R.B. No. 117, 45 L.R.R.M. 1407 (Mar. 2, 1960,), *now pending on review in the D.C. Circuit*, No. 15631. There is only one significant difference between those cases and the present case. In the present case, the contractors' gate had existed for some time. In the *Phelps Dodge* case, the special gate

for contractors was established shortly before the strike, and in anticipation of it. And in the *Virginia-Carolina* case, the fence and the special gate were constructed only after the strike began.

The present decision was the basis for the Board's ruling in each of those cases. Thus, if we are correct in our view that the present decision is erroneous, it would follow that the Board's decisions in those cases are also erroneous.

The interest of the *amici,* however, goes far beyond their interest in two pending cases. Those cases are only a taste of what will happen to the right to strike and to picket if the present decision is sustained. They illustrate the ease with which an employer can avoid the normal effect of a picket line, under the rule promulgated in the present case, by establishing a separate gate for employees of other employers. Unless the Board is reversed here and now, the right of a union to induce employees of other employers to stay away from struck premises will be virtually eliminated.

It will be our purpose, in this brief, to show that Congress did not intend, when it enacted Section 8(b)(4)(A) of the Taft-Hartley Act, to interfere with the right of a union to picket an employer with whom it has a legitimate dispute in an effort to keep all third persons away from the employer's premises. We will demonstrate that, prior to the present decision and others which have followed it, the Board and the courts had uniformly recognized that such picketing was one of the types of concerted action protected by Sections 7 and 13 of the Act. Finally, we will show that the Board's cease and desist order in the present case could not be enforced even if the Board's interpretation of the original statute were correct, since the recent amendments to the Act, which were passed shortly after the Board's decision in this case, make clear that the kind of conduct which the union engaged in here is not an unfair labor practice.

SUMMARY OF ARGUMENT

I—The legislative history of Section 8(b)(4), as well as the Board and court decisions interpreting it, make clear that that provision, despite its broad language, was intended only to prohibit "secondary" boycotts and "secondary" picketing, but was not designed to restrict the normal economic weapons that unions traditionally use at the site of a labor dispute. Thus, it has been consistently held that it is not a violation of Section 8(b)(4) for a union to picket the employer with whom it has a legitimate "primary" dispute, even though such picketing invariably has as one of its objects inducing employees of other employers not to cross the picket line. Similarly, the cases hold that a union may use speeches, telephone calls, letters, internal union discipline, or any other means to induce other employees to stay away from the primary employer's premises. Such appeals have never been held to violate the statute so long as the employees of other employers are not asked to engage in work stoppages at any place other than the site of the primary dispute.

This Court has itself upheld the right of a union to ask employees of other employers not to cross a primary picket line in *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665 (1951). While that opinion was not written precisely in terms of the distinction between primary and secondary activities, it has always been considered by the Board and the lower federal courts to have approved that distinction.

There is no basis, either in law or in logic, for distinguishing the present case from any other situation involving picketing at the premises of a primary employer in support of a primary strike.

II—Neither the Board nor the court below made clear the basis on which they considered this case to be different from any other case of primary picketing. It is necessary, there-

fore, to examine each of two alternative rationales the Board may now rely upon in an effort to justify the result reached here.

When the present case was first decided, it was generally assumed that the fact which distinguished this case in the minds of the Board and the court was the presence of a reserved gate for employees of other employers. This is, of course, a totally nonsensical distinction. Either it is or it is not unlawful to induce employees of other employers to refrain from working at struck premises; what possible difference can a separate gate make?

The effect of a rule prohibiting picketing at an entrance reserved for employees of other employers would be in many cases to make it virtually impossible for a union to run an effective primary strike, since an employer could continue to ship accumulated inventories through a reserved gate, or could use the strike period to do major repair or reconstruction work by bringing in outside employees through such a gate.

In addition, a rule which would prohibit picketing of struck premises at any gate would present great constitutional difficulties. To the extent that Section 8(b)(4) prohibits peaceful persuasion, this Court has held it to be constitutional because it prohibits inducing or encouraging unlawful action. But the statute expressly protects the right of an employee to refuse "to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act . . ." Thus, to prohibit any picketing of struck premises is to prohibit free speech which is designed to persuade employees to exercise a right given them by law. If the statute could possibly be construed in this way, it would plainly be unconstitutional.

There is some suggestion in subsequent Board decisions that the Board now relies on the so-called "common situs" doctrine, rather than the presence of the separate gate *per se*, as the basis for the present decision. While neither the Board's opinion nor the opinion of the court below appeared to rely on this theory, counsel for the Board may now attempt to justify the decisions on this ground.

The common situs rules are totally inapplicable here. They were developed to govern picketing in the situation where the primary employer's business is located on the premises of another employer, or where two or more employers share a common premises which is not in any meaningful sense the premises of any one of them. In those situations, a union which pickets the "common situs" might often cause a shutdown of all the operations of the other employers at the same site, even though the only relationship between those operations and the primary employer is that they happen to be physically adjacent. An employer not involved in any way in the dispute, and not performing any services for the primary employer, would thus be shut down. Since this is precisely what the statute was intended to prevent, the Board has established certain limitations governing picketing at a common situs. The purpose of these rules is to limit the impact of such picketing in such a way as to make it substantially equivalent to primary picketing at a single employer's premises.

The very case which established the common situs rules reaffirmed the principal that primary picketing at the premises of a single primary employer is lawful even though it induces employees of other employers not to cross the picket line. *Sailor's Union (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950). That case made it perfectly clear that the purpose of the common situs rules was not to limit all picketing appeals to primary employees, but rather to limit common situs picketing in such a way that work stop-

pages by secondary employees would not be more widespread than would occur in the normal primary picketing situation. Thus there is no basis for applying the common situs rules to the present case, which involves none of the special factors which are present in those cases.

III—The present case arose prior to the recent amendments to Section 8(b)(4), and is governed by the original statute. However, the amended version is relevant in two ways. First, it helps to clarify the meaning of the original version. Secondly, if this Court should accept the Board's interpretation of the old statute, it must nevertheless refuse to enforce the Board's order, which operates prospectively, unless it determines that the union's conduct would also be an unfair labor practice under the amended statute.

The amendments added to Section 8(b)(4)(A) contain a specific proviso protecting "any primary strike or picketing." The legislative history of this proviso makes it quite clear that it was designed to protect the right of a union to picket at the premises of a primary employer and to induce employees of other employers not to work at those premises. It also makes clear that Congress included specific language dealing with this matter not because it thought that such picketing was previously prohibited, but because it feared that other changes in language which had been made in Section 8(b)(4) might cast doubt on the legitimacy of traditional primary picketing. Thus the new statute, read in the light of its legislative history, confirms our interpretation of the original Act.

The new statute makes clear that, regardless of the correctness of the Board's present decision under the original terms of Section 8(b)(4), the union's conduct would not violate that statute in its current form. Thus, under familiar principles of equity, the Board's cease and desist order cannot now be enforced.

ARGUMENT

I. SECTION 8(b)(4) DOES NOT PROHIBIT PICKETING OR OTHER ACTION DESIGNED TO INDUCE EMPLOYEES OF OTHER EMPLOYERS TO REFUSE TO WORK AT PREMISES WHERE EMPLOYEES OF A PRIMARY EMPLOYER ARE ENGAGED IN A LAWFUL PRIMARY STRIKE.

This case arose under Section 8(b)(4)(A) of the Taft-Hartley Act, 29 U.S.C. §158(b)(4)(A) (1958), as it stood prior to its recent amendments. Although, as we will show below, the amendments are relevant to this case, we will first discuss the law as it existed when this case arose.

The pertinent portion of the original statute provides that it is an unfair labor practice for a labor organization

> "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods . . . or perform any services, where an object thereof is: (A) forcing or requiring any . . . person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

This has been one of the most troublesome provisions of a very troublesome act. If read strictly and literally, it would prohibit almost all strikes and picketing, since the object of every strike is to prevent the struck employer from doing business "with any other person" until the employer complies with the striking union's demands. This is not, however, what the statute was designed to prevent. Indeed, Sections 7 and 13 of the National Labor Relations Act protect in very broad language the right to strike and to engage in other concerted activities. 29 U.S.C. §§157, 163. Section 8(b)(4)(A) had a relatively narrow purpose,

which Senator Taft, the chief architect of the legislation, expressed as follows:

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. The Senator will find a great many decisions . . . which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." 93 Cong. Rec. 4201 (April 29, 1947).

Thus, as this Court has pointed out,

> "While § 8(b)(4) does not expressly mention 'primary' or 'secondary' disputes, strikes, or boycotts, that section is often referred to in the Act's legislative history as one of the Act's 'secondary boycott sections.' The other is § 303, 61 Stat. 141, 29 U.S.C. (Supp. III) § 187, which uses the same language in defining the basis for private actions for damages caused by these proscribed activities." *NLRB* v. *Denver Bldg. Trades Council,* 341 NLRB 675, 686 (1951).

In short, this Section was not intended to affect primary strikes, but only "to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods." *Local 1976, United Bh'd of Carpenters* v. *NLRB,* 357 U. S. 93 (1958).

While it was never disputed that Section 8(b) (4) (A) did not interfere with the right to strike against an employer with whom a union had a primary dispute, a question was raised very early in the history of the statute as to whether picketing at the premises of such a primary employer was in any way to be restricted. It was argued that since "an object" of such picketing was to turn away employees of secondary employers who, in the course of their employment, would have occasion to come to the primary employer's premises, such picketing might be unlawful.

Nowhere in the legislative history is there any suggestion that Congress intended to restrict the universal practice of striking unions to picket the employer against whom they are striking, in an effort to keep all persons — employees, consumers, and employees of other employers — from entering the struck premises. Indeed, a proviso at the end of Section 8(b)(4) specifically states that "nothing contained in section 8(b)(4) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act." Thus the section read as a whole, particularly in the light of the legislative history, would seem to permit a striking union to induce employees of other employers to respect a picket line at the premises of a primary employer.

The leading decision of the Board dealing with this problem is *Oil Workers Int'l Union (Pure Oil Co.)*, 84 N.L.R.B. 315 (1949). There a union was on strike against Standard Oil Company at a dock which was owned by Standard but which was used by both Pure Oil Company and Standard for shipment of oil. Tankers, owned by separate employers, loaded oil shipped by both Standard and Pure at that dock. In support of its strike against Standard, the union

picketed the dock, and as a result the employees of Pure refused to work at those premises. The union also wrote a letter to the employees of Great Lakes, an operator of one of the tankers which normally stopped at the dock, informing those employees that Pure Oil products at the dock, unless loaded by Standard supervisors, were to be considered "hot."

The complaint alleged that the union violated the act "by advocating strike action by employees of both Pure Oil and Great Lakes, in order to force Pure Oil to cease doing business with Standard Oil, and to force Great Lakes to cease doing business with Pure Oil." 84 N.L.R.B. at 317. The Board concluded, however, that the union's conduct was "*primary* action in support of its strike against Standard Oil" and involved only the "traditional means of conveying to fellow workers and to the public at large the fact that a labor dispute exists with Standard Oil." *Id.* at 317-318 (Emphasis in original.)

The Board conceded that the "picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer," but held that that fact did not make the picketing unlawful under 8(b)(4). The Board pointed out that the purpose of the statute, as evidenced by its legislative history, was to prohibit secondary boycotts, but not to interfere with traditional primary activities. Accordingly, the Board concluded "that the section does not outlaw any of the primary means which unions traditionally use to press their demands on employers." The picket line at the employer's premises and the letter to the employees of Great Lakes both fell into that category, said the Board, since they both "amounted to nothing more than a request to respect a primary picket line *at the Employer's premises.*" 84 N.L.R.B. at 319 (emphasis in original).

It is significant that the lone dissenter in the *Pure Oil* case, Board Member Gray, did not disagree with the gen-

eral principles on which the majority's opinion was based. He disagreed only as to the import of the union's letter to the Great Lakes employees. In his view, it induced and encouraged those employees to boycott the "hot" oil at places *other* than the struck premises. He concluded, therefore, that the union's conduct was unlawful to the extent that it "sought to extend its activity to a front outside the area of the immediate dispute."

The principle that a union does not violate 8(b)(4) when, by picketing or otherwise, it induces employees of other employers to refuse to enter the premises of a primary employer where the union is engaged in a legitimate primary dispute, was reaffirmed in *Newspaper Deliverers' Union (Interborough News Co.)*, 90 N.L.R.B. 2135 (1950). There a union was engaged in a primary strike at the New York subway newsstands. In support of this strike the union not only placed pickets at some subway entrances, but also "visited employees of other employers who normally deliver newspapers to Interborough's newsstands, and induced and encouraged these employees, who are also members of the Respondent, not to make deliveries to the struck employer's subway newsstands." 90 N.L.R.B. at 2135. Relying on the *Pure Oil* decision, the Board held that the union had not violated 8(b)(4) by this course of conduct, since the union's "inducement invited action only at the premises of the primary employer, whose employees were on strike. . . . " Id. at 2135.

The issue was presented to this Court in *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665 (1951). In that case, a union picketed an employer in order to obtain recognition as the bargaining representative of that employer's employees. "In the course of their picketing, the agents sought to influence . . . two men in charge of a truck to refuse, in the course of their employment, to go to the mill for an order of goods." 341 U.S. at 667. The Board, following its *Pure Oil* decision, held that this was a primary

activity not prohibited by Section 8(b)(4)(A). 84 N.L.R.B. 360. The Fifth Circuit reversed, holding that "these activities became secondary when the strikers attempted to induce and encourage the employees of this neutral employer Sales House. The fact that they occurred near the struck employer's plant is not enough to draw such a distinction as the Board attempts to draw . . ." 183 F. 2d 21, 26.

This Court upheld the Board and reversed the Fifth Circuit, holding that

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8(b)(4), and they do not here." 341 U.S. at 671.

As the above excerpt indicates, the Court did not put its opinion in terms of the distinction between primary and secondary activities as the Board had done. Nevertheless, the *Rice Milling* opinion is generally deemed to have approved the rule that a union may induce employees of other employers not to enter the premises of the primary employer.

The Court's opinion stressed the fact that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike . . ." 341 U.S. at 672. Citing section 13 of the act, 29 U.S.C. § 163, the Court stated that

> "parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act. No such specific provision

in § 8(b)(4) reaches the incident here. The material legislative history supports this view."

These portions of the opinion demonstrate the Court's awareness of the fact that the kind of conduct which the union had engaged in was protected as part of the right to strike, and for that reason alone could not be considered unlawful under § 8(b)(4)(A). Thus, while in the particular case only "two employees in charge of a truck" were induced to stay away from the picketed premises, the opinion, read as a whole, indicates that the Court would have reached the same result in any case involving picketing of the kind which traditionally accompanies a primary strike.

There is, indeed, a very strong indication in *Rice Milling* that the Court would have considered its decision controlling in the present circumstances. The Court cited, in support of the proposition that Congress intended to safeguard the right to strike, *United Electrical & Machine Workers (Ryan Constr. Co.)* 85 N.L.R.B. 417, 418 (1949). In that case, as in the present one, a union on strike against an employer picketed a gate to the employer's premises which was used only by employees of an independent construction contractor, who was engaged in a construction project on the premises. The Board concluded that the picketing was lawful, in a decision which it has recently overruled because of its conflict with the present case. See *Local No. 36, Int'l Chemical Workers,* 126 N.L.R.B. No. 117, 45 L.R.R.M. 1407 (Mar. 2, 1960). The critical portion of the Board's opinion in the *Ryan* case appears on the page which the Court cited with approval in *Rice Milling:*

> "As the record reveals and the Trial Examiner finds, the Respondents, in support of their demands on Bucyrus, proceeded to picket the entire Bucyrus premises, including the gate that had been cut through the fence to provide ingress for Ryan employees to the site of

a construction project Ryan was performing for Bucyrus. All this picketing was therefore primary picketing. Concededly, an object of the picketing was to enlist the aid of Ryan employees, as well as that of employees of all other Bucyrus customers and suppliers. However, Section 8(b)(4)(A) was not intended by Congress, as the legislative history makes abundantly clear, to curb primary picketing. It was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary employer.[2] When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 other employees wish to enter the premises. It follows in this case that the picketing of Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus,* did not lose its character and become 'secondary' at the so-called Ryan gate because Ryan employees were the only persons regularly entering Bucyrus premises at that gate." 85 N.L.R.B. at 418.

In the present case, the court below dismissed *Rice Milling* as inapplicable: "This was no case of a union's seeking 'to influence two employees of a customer of the mill not to cross the picket line.'" 278 F. 2d at 286. We submit, however, that the opinion as a whole, particularly in light of the citation of *Ryan,* makes clear that the decision turned

---

"[2] See Matter of Oil Workers International Union, Local Union 346 (CIO) and The Pure Oil Company, 84 N.L.R.B. 315; Matter of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 201, AFL, and The International Rice Milling Co., Inc., et. al., 84 N.L.R.B. 360" (footnote by the Board.)

not on the number of secondary employees involved, but on the fact that they were induced merely to honor a picket line at the premises of the primary employer. Thus, in one of the companion cases to *Rice Milling,* the Court held that inducements directed to two employees of a secondary employer were unlawful. In that case, the employees were induced to refrain from working at a "common situs." *International B'hd of Elec. Workers* v. *NLRB,* 341 U.S. 694 (1951). This confirms our view that the controlling fact in Rice Milling was that the secondary employees were induced to refrain from working at the primary employer's premises, and not that the number of employees involved happened to be two.

The Board and the courts have consistently applied *Rice Milling* as we have interpreted it. Thus, in its 1953 Annual Report, the Board stated the rule to be as follows:

> "Ordinarily, a union's conduct is held to be secondary and prohibited if it occurs at the premises of a secondary employer and calls for action of employees of the secondary employer away from the primary dispute's actual site. On the other hand, picketing confined to the primary employer's premises is lawful even though it has the traditional objective to induce third persons from entering the premises for business reasons." Eighteenth Ann. Rep. of the NLRB 48 (1953). See also Sixteenth Ann. Rep. of the NLRB 226 (1951).

The courts have followed this principle. For example, in *DiGiorgio Fruit Corp.* v. *NLRB,* 191 F. 2d 642, 648-49 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 869 (1951), the District of Columbia Circuit affirmed the decision of the Board that it was not an unfair labor practice for the Teamsters Union, in conjunction with an organizing campaign at DiGiorgio, to picket the entrance to DiGiorgio's premises and to attempt to persuade truck

drivers employed by other employers not to pick up or deliver goods there. Some drivers who crossed the picket line were subject to internal union discipline by the Teamsters. The Court held that "such picketing activity is called a primary activity in the language of labor law" and is not prohibited by Section 8(b)(4)(A), which was intended to reach only "secondary" boycotts.

In *Local 618, Automotive Employees* v. *NLRB,* 249 F. 2d 332 (1957), the Eighth Circuit held that a union which was on strike against a chain of gasoline stations did not commit an unfair labor practice by picketing one of those stations, which had been temporarily shut down by the employer for remodeling, even though the plain purpose of the picketing was to induce the employees of the construction contractors, who were doing the remodeling, not to work at that place. The only difference between that case and the present case is that here a special gate to a single premises rather than one station in a chain of stations was designated by the employer as "off limits" to his own employees.

And in a very recent decision, the Seventh Circuit has reaffirmed the principle that it is not an unfair labor practice to attempt to induce employees of other employers not to enter the premises of the primary employer. *Milwaukee Plywood Co.* v. *NLRB,* 47 L.R.R.M 2291 (December 20, 1960). In that case, a union which had a primary dispute with an employer in Chicago picketed the premises of the employer's subsidiary in Milwaukee. After two days, the subsidiary's employees crossed the picket line, but employees of other employers, who came to the premises in the course of their employment, refused to cross. The employer charged that by inducing these employees of other employers to refrain from working the union had violated Section 8(b)(4). The Court, affirming the decision of the Board, held that this conduct "is no different in legal contemplation from the conventional situation where a

union sets up a picket line at the premises of an employer with whom it has a dispute." It relied chiefly upon Section 13 of the Act, the *Rice Milling* decision, and *DiGiorgio*. Referring to the language in the *Rice Milling* decision which distinguishes "individual" and "concerted" conduct, the court stated:

> "The phraseology used in describing primary picket line activities varies. Sometimes it is referred to as primary rather than a secondary activity; again, individual rather than concerted action, and at times the courts refer to the 'object' test. However, the courts seem to be in general agreement that Section 8(b)(4)(A) does not prohibit conduct on the picket line which is designed to secure observance of that line by employees of other employers who come to the picketed premises to make pickups or deliveries."

While the Seventh Circuit attempted to distinguish the decision in the present case on the ground that this case involves "a common work situs," we will show in a subsequent section of this brief that this distinction is wholly untenable.

It is noteworthy that the *Milwaukee Plywood* case was decided by the Board subsequent to its decision in the present case. It represents only one of several recent decisions in which the Board has continued to uphold the general right of a union to picket the premises of a primary employer in an effort to keep all persons—including employees of other employers—from entering.

In *International Organization of Masters, Mates & Pilots*, 125 N.L.R.B. No. 19, 45 L.R.R.M. 1059 (November 12, 1959), the Board held that appeals to secondary employees by way of telegram and talks at union meetings were not in violation of 8(b)(4), because "the inducement of other union members and of secondary employees invited their action of refusing to perform services only on the foreign

vessels, the situs of the primary dispute." The *Pure Oil* and *Interborough News* cases were specifically relied on. And in *International B'hd of Teamsters (Alexander Warehouse Co.)*, 128 N.L.R.B. No. 105, 46 L.R.R.M. 1409 (Aug. 25, 1960), the Board upheld the right of a union, which was engaged in a primary strike against a warehouse, to picket two other warehouses owned by the same employer, and to address oral appeals to the employees of other employers not to cross the picket line. Since the employees at the two warehouses were non-union, the object, and the effect, of the picketing was mainly to keep other employees away. Nevertheless, the Board correctly held that these appeals, "aimed as they were at inducing observance of a picket line at premises solely occupied by the primary employer, constituted a permissible form of primary activity." 46 L.R.R.M. at 1410.

The cases which we have reviewed, while certainly not an exhaustive list, should be sufficient to establish the general proposition that it has always been held to be within the area of legitimate primary activity for a union to induce employees of other employers not to enter the premises of a primary employer. As we have seen, such inducements have been upheld whether they be in the form of a picket line, oral appeals, letters, telephone calls, internal union discipline, speeches at union meetings—or any other form of communication. The Board, so far as we have been able to determine, does not attack that general proposition, but considers it inapplicable in the present case. We turn now, therefore, to the question of whether there is any basis in law or logic for treating this case differently than any other case of primary picketing.

II—THERE IS NO BASIS FOR DISTINGUISHING THIS CASE FROM ANY OTHER CASE OF PRIMARY PICKETING.

The long line of precedent which we have reviewed above was discussed at length in the Intermediate Report of the

Trial Examiner in the present case. (R. 23-29). It was his conclusion, on the basis of a thorough analysis of the cases, that the conduct of the union here was traditional primary picketing which is not prohibited by Section 8(b)(4)(A). The Board, without referring to a single one of the cases cited by the Examiner, stated simply: "We disagree." (R. 42). The ground for this "disagreement" is stated by the Board in only one cryptic sentence:

> "We find also that the Respondent's object in picketing at gate 3-A was to enmesh these employees of the neutral employers in its dispute with the Company." (R. 42).

The court below also completely ignored the precedents to which the Trial Examiner had referred, and held simply that "the Board reasonably could find, as it did find, that the Union by peaceful picketing to be sure, but effectively nonetheless, sought to encourage the employees of the independent contractors to engage in a concerted refusal to perform any services for their employers in the course of their employment and thus to force their employer to cease doing business with the Company." 278 F. 2d at 286.

This case thus comes to this Court without having had, at any previous stage, a detailed and reasoned articulation of the grounds for the decisions below. It is therefore necessary to examine two alternative rationales, neither of which are expressly set forth in the opinions below, but both of which are hinted at either in the present case or in similar cases decided subsequently by the Board.

A. *The Reserved Gate Rationale*

It was generally assumed, when the present decision was rendered, that the critical fact which in the minds of the Board and the court distinguished this case from all other cases was the presence of a "reserved gate" for employees of other employers. The opinions below placed great em-

phasis on that single fact, and subsequent cases demonstrate that employers, assuming that this was the controlling fact, began to establish "reserved gates" for the express purpose of taking advantage of the present decision. See *Local 36, International Chemical Workers,* 126 N.L.R.B. No. 117, 45 L.R.R.M. 1407 (Mar. 2, 1960); *United Steelworkers,* 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (Apr. 2, 1960).

The notion that it would be permissible to induce employees of other employers to refuse to enter the premises of a primary employer through a gate used jointly with primary employees, but unlawful to induce them to refrain from entering the same premises through a gate reserved exclusively for them, is, to put it simply, nonsensical. Either it is or it is not unlawful to induce employees of other employers to refrain from working at struck premises; what possible difference can a separate gate make? Anyone who has attempted to explain this distinction to union members knows by their reaction how unreal and foreign any such notion is to the people actually involved in industrial relations.

More importantly, perhaps, this doctrine could in many situations destroy the effectiveness of a strike, and thereby emasculate the right to strike. Suppose, for example, that a manufacturer had sufficient capacity to produce a substantial inventory of his product prior to the strike. If, by the simple device of establishing a separate gate, he could continue to fill orders by having common carriers pick up goods at that gate without the interference of union pickets, the economic effect of the strike on the employer could be neutralized for an indefinite period. Similarly, suppose the nature of an employer's operation is such that it must be periodically closed down for repair or alteration. If the employees of contractors could be brought in to do that work, through a separate gate, the employer would benefit rather than suffer from the strike, at least for the period required to do the necessary work. While such flagrant ex-

amples may not occur often, there are undoubtedly numerous situations in which this technique could be used to lessen, if not completely eliminate, the economic pressure caused by a strike. It is precisely for that reason that it has always been considered not a secondary boycott but a normal part of a primary strike for a union to attempt, by peaceful persuasion, to prevent employees of other employers to refrain from working at struck premises.

Moreover, the "reserved gate" rationale raises very substantial constitutional difficulties. That aspect of Section 8(b)(4) which prohibits peaceful persuasion, by picketing or other means, was held by this Court to be constitutional because it prohibits only the inducement or encouragement of *unlawful* action. *International Bh'd of Elec. Workers* v. *NLRB*, 341 U.S. 694, 705 (1951). But the proviso to Section 8(b)(4) expressly protects the right of any employee to refuse "to enter upon the premises of any employer other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . ." Thus, to prohibit picketing at any gate to a primary employer's premises in support of a lawful primary strike is to prohibit a union to attempt, through peaceful free speech, to persuade other employees to exercise a right expressly conferred upon them by the Act. Even if it were assumed that the Act contemplated this anomalous result, the Constitution would prohibit it.

B. ***The Common Situs Rationale***

There is one situation in which, for many years, the Board and the courts have applied certain limitations on the right of a union to picket a primary employer. This situation involves what is called common situs picketing, and is best illustrated by the first case in which the rules governing such situations were promulgated. *Sailor's Un-*

ion of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950).

In *Moore Dry Dock*, the primary employer, the owner of a ship, was involved in a dispute with the union representing the sailors. The ship was being serviced at Moore Dry Dock, and there was no way to picket the ship without at the same time picketing the premises of Moore, an independent "secondary" employer. The Board held that "when a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute." 92 N.L.R.B. at 549. In order to balance these two conflicting "rights," the Board laid down four criteria to which picketing in such a situation must conform in order to be valid: (1) It must take place only at times when the *situs* of the dispute is located on the secondary employer's premises, (2) it must take place only when the primary employer is engaged in its normal business at the *situs*, (3) the picketing must be reasonably close to the location of the *situs*, (4) the picket signs must make clear that the dispute is with the primary employer.

The same restrictions have been applied in cases where the primary employer's business is trucking, and the picketing takes place at the premises of secondary employers where the trucks stop to make deliveries or pick up shipments, *e.g.*, *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65 (2d Cir. 1951), or where the primary employer is a construction contractor working at a construction site where other contractors are also working. *E.g. Brotherhood of Painters*, 110 N.L.R.B. 455 (1954). See also *Retail Fruit Union* v. *NLRB*, 249 F. 2d 591 (9th Cir. 1957), in which the common situs doctrine was applied to picketing of a market housing several independent retail stands.

Neither the opinion of the Board nor the opinion of the Court of Appeals in the present case appear to be based

on the common situs doctrine. Indeed, Member Fanning concurred specially, urging that that doctrine is what the Board should have applied. In a subsequent case, however, involving essentially the same facts presented here, the Board adopted the opinion of a Trial Examiner which relied heavily on common situs precedents. *United Steelworkers,* 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (April 2, 1960).

It is, to say the least, unfortunate that we must write our brief before ascertaining precisely on what grounds the Board will defend the present decision. Since the Board may rely on the common situs doctrine, we feel compelled to deal with that issue in our brief, although it does not appear that this was the basis of either decision below and reliance upon it in this Court would, therefore, be wholly improper. *SEC* v. *Chenery Corp.,* 318 U.S. 80, 87-95 (1943).

The common situs rules were never intended to prevent a striking union from inducing employees of other employers to refrain from doing work which benefits the primary employer at the primary employer's premises. Rather, they were intended to implement the policy of the act against the spreading of labor disputes by preventing a union's picket line at a common situs from inducing employees of other employers to refrain from work which does not affect the primary employer, but which happens to be performed at the common situs.

If a striking union could picket a construction project or other common situs without any limitation, the result would often be a complete stoppage of work by all union workers at that site. See *NLRB* v. *Denver Bldg. Trades Council,* 341 U.S. 675 (1951). The *Moore Dry Dock* rules, on the other hand, tend to limit the picketing in such a way that its effect is approximately the same as it would be at a single employer's premises.

A good example is the case cited by the Board in its de-

cision here, *Atomic Projects and Production Workers (Associated General Contractors)*, 120 N.L.R.B. 400 (1958), *enf'd per curiam*, 262 F. 2d 931 (D.C. Cir. 1959). There the primary employer was Sandia Corporation, which operated a steam plant on an Atomic Energy Base. A number of construction contractors were working on several construction projects on the Base. None of the contractors were performing any work for or had any relationship with the primary employer; they simply happened to be located on the same physical premises. When the Base authorities were informed that there was a labor dispute with Sandia, they set aside a separate gate for the contractors and their suppliers. The union representing Sandia's employees picketed that gate, and the Board found that the picketing was an unfair labor practice. Since adequate precautions were taken by the Base to assure that only the contractors and their suppliers were permitted to use the special gate, it is plain that the picketing of that gate was not the equivalent of picketing the premises of the primary employer. The effect of the picketing was not to keep third persons away from the premises of the primary employer, but rather to induce employees of other employers to refuse to perform work which had no connection with the primary employer at all. This is, of course, quite different from picketing a separate gate to the premises of the primary employer, and inducing employees of other employers to refrain from working only at the premises of the primary employer.

While the term "common situs" may be somewhat ambiguous, it is perfectly clear from the cases that it does not refer to every situation in which employees of more than one employer happen to perform work, in the course of their employment, at a single place of business. If that were so, every industrial plant, every warehouse, every store would be a "common situs," since all such establishments are regularly visited by common carriers, employees

of customers or suppliers, painters, carpenters, plumbers, and innumerable other "secondary" employees. Thus if *Moore Dry Dock* were read as applying to every case in which the employees of more than one employer are present at the site of a labor dispute, the effect would be to impose the *Moore Dry Dock* requirements on all primary picketing.

The *Moore* opinion itself makes it perfectly clear that no such result was intended. Indeed, that opinion opens with a reaffirmation of the principle that "picketing at the premises of a primary employer is traditionally recognized as primary action even though it is 'necessarily designed to induce and encourage third persons to cease doing business with the picketed employer.' " The opinion cited with approval the reasoning and the result in the *Ryan* case, which, as we have seen, directly supports our position in the case at bar. It then went on to distinguish the typical primary picketing situation from the situation presented in that case in the following way:

> [I]f Samsock, the owner of the *S. S. Phopho,* had had a dock of its own in California to which the *Phopho* had been tied up while undergoing conversion by Moore Dry Dock employees, picketing by the Respondent at the dock site would unquestionably have constituted *primary* action, even though the Respondent might have expected that the picketing would be more effective in persuading Moore employees not to work on the ship than to persuade the seamen aboard the *Phopho* to quit the vessel. The difficulty in the present case arises, therefore, not because of any difference in the picketing objectives, but from the fact that the *Phopho* was not tied up at its own dock, but at that of Moore, while the picketing was going on in front of the Moore premises." 92 N.L.R.B. at 548-49.

Thus the opinion in *Moore* makes it perfectly clear that it was not intended to reverse or affect in any way the prin-

ciple that a union may, by picketing or otherwise, induce secondary employees to refrain from working *at the premises of a primary employer.*

The present case would be analogous to *Moore Dry Dock* if it had been the employees of the contractors, rather than the employees of General Electric, who had been on strike. In that situation the effect of *Moore* would be to prohibit the contractors' employees from picketing the entire plant and thereby inducing a strike by the employees of General Electric. Significantly, the "contractor's gate" was originally established in order to provide a place where contractors' employees could picket without reaching General Electric employees (R. 39), and the present decision is the first one to suggest that Section 8(b)(4) could also be applied to prevent GE employees from picketing a gate to their own employer's premises merely because that gate is exclusively reserved to other employees.

The distinction between these two situations is fundamental. It is the difference between picketing one's own employer, thereby inducing third persons from entering his premises, and picketing a "neutral" employer, thereby inducing work stoppages at a point away from the site of the primary dispute.

> [I]t is clear . . . that Congress did not intend to forbid picketing at a primary employer's premises, the situs of a dispute. Section 8(b)(4) must be interpreted and not merely read literally. No matter how great the pressure on a neutral employer may be when somebody else's place of business is picketed, it is essentially different from the pressure such a neutral feels when his own business is being picketed. This difference in pressure, between that which occurs, somewhat indirectly, when another employer's premises are picketed and that which occurs when a neutral employer's own premises are picketed, is the rationale which must govern the interpretation of Section 8(b)

(4). *Seafarers Int'l Union* v. *NLRB,* 265 F. 2d 585, 591 (D.C. Cir. 1959).

If the basis for the decision here is in fact the common situs doctrine, then it follows that the same result would have been reached even if there had been no reserved gate. Indeed, in a recent decision, rendered subsequent to the present one, the Board, applying the *Moore Dry Dock* criteria, held that picketing at the only entrance to the primary employer's plant was an unfair labor practice, since it induced employees of other employers not to enter the premises. The primary employer's plant was a common situs, the Board held, because the secondary employer, a construction contractor, was "engaged in work for a relatively extended period of time at the premises" of the primary employer. *Union De Trabajadores, (Gonzales Chemical Industries, Inc.),* 128 N.L.R.B. No. 116, 46 L.R.R.M. 1423 (August 26, 1960). Member Fanning, who advocated application of the *Moore Dry Dock* rules in the present case, apparently realized the implications of that position and dissented in *Gonzales.* He there pointed out that "the rule here annunciated by the majority renders virtually all primary picketing subject to the *restricting* aspects of *Moore Dry Dock,* contrary to statutory and decisional law insuring the right of employees to engage in the traditional primary strike."

Perhaps the most eloquent attack on this extension of the *Moore Dry Dock* principle to the typical picket line at the single employer's place of business was voiced by the Trial Examiner in *Gonzales,* whom the Board reversed. In rejecting the contentions of the General Counsel in that case, the Examiner wrote as follows:

> "Implicit if not explicit in the General Counsel's argument is the prediction that the Board will rule that primary picketing and oral appeals must be restricted, even at the primary situs, to employees of the struck

employer. The effect of such a holding on the right to picket, the right to publicize disputes and the right to ask for traditional observance of the picket line by other unions and their individual members and by the employees of other employers will be more than substantial. It will emasculate, to a significant extent, the vigor of the picket line. It may well be, as Mr. Justice Douglas said of the Supreme Court in the *Vogt* case, that the Board is about to make the full cycle and that settlement of strikes by injunction will again prevail, the Norris-LaGuardia Act notwithstanding. If the General Counsel is correct in his contentions herein then all picketing may be enjoined which is not addressed and confined solely to the employees of the struck employer. In such case the primary duty of the pickets may be to provide an escort service for the employees of other employers, since anything which falls short of open invitation to enter the struck premises could well be construed as an appeal not to enter. Perhaps a political climate has been reached where the right of employees to strike is subjugated to the privilege of the employer to be free from inconvenience resulting from labor disputes. If so, the rights of employees are clearly in peril and those labor organizations which seek to represent them at the bargaining table may have no weapon stronger than supplication and no ultimate recourse but surrender."

We urge this Court to rescue the right to strike from the inroads which the Board has made on it in this case and related cases. What is involved here is simple, primary picketing of the kind which the act specifically protects. This is not a secondary boycott. Neither is it "common situs" picketing. It is picketing at the premises of the primary employer, and employees of other employers are affected only in that they are induced not to work at the premises of a struck employer. The validity of such picket-

ing and such inducements must be reaffirmed if the rights of workers guaranteed in Section 7 and Section 13 are to be preserved.

III. THE RECENT AMENDMENTS TO SECTION 8(b)(4) MAKE IT CLEAR THAT THE PICKETING IN THIS CASE WAS NOT AN UNFAIR LABOR PRACTICE UNDER THE OLD LAW AND WOULD NOT BE ONE UNDER THE AMENDED ACT.

As we have previously pointed out, the picketing which is the subject of this case took place prior to the recent amendments to the Taft-Hartley Act. If, as we have contended, that picketing was not unlawful under the old Act, the Board's decision would have to be reversed regardless what the effect of the new amendments might be on such picketing. Congress specifically provided that its amendments to Taft-Hartley would not become effective until 60 days after the date of enactment (September 14, 1960), and that:

> "No provision of this Title shall be deemed to make an unfair labor practice any act which is performed prior to such effective date which did not constitute an unfair labor practice prior thereto." P. L. 86-257, §707, 73 Stat. 546.

Nevertheless, the new amendments are relevant to this case. As often happens, the new version helps to clarify the old. In addition, if this Court should hold, contrary to our contentions above, that the Board's decision was correct under the old law, then the Court would have to determine whether such conduct would be illegal under the new law. Since the Board's cease and desist order operates prospectively, it cannot be enforced unless picketing of the kind involved here would be an unfair labor practice not only under the old law but also under the new law. See, *e.g.*, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1855).

The pertinent portion of the statute as amended makes it an unfair labor practice for a labor organization:

> "to engage in, or to induce or encourage *any individual employed by any person* . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is:
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .: Provided, *That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary Picketing;*" 29 U.S.C. §158(b)(4)(B) (Supp. I, 1959) (Emphasis added.)

The only changes which are significant for the purposes of this case are indicated above in italics. The first of these makes it unlawful to induce or encourage *any individual* employed by any person to engage in a strike or other refusal to work where the object is one of those proscribed by the section. Under the prior law, it was only unlawful to induce employees to engage in "concerted" refusals to work. The second change is the addition of the proviso at the end of subparagraph (B) which specifically protects "primary strikes" and "primary picketing."

These two changes are obviously not unrelated. As we have seen, the original statute could have been interpreted as prohibiting all picketing, if the language were read strictly and without reference to its underlying purpose. Recognizing that this was not the intention of the Congress, the Board and the federal courts had held, in the line of cases

to which we have referred, that primary picketing was not prohibited even though it almost always induces employees of other employers to refrain from crossing the picket line. This view was approved by the Supreme Court in *Rice Milling*. In that case, however, the Court, rather than relying on the primary-secondary distinction, used the word "concerted" as the basis for its decision, and held that primary picketing is not unlawful because "a union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees." 341 U.S. at 671.

When the new legislation was being considered by the Conference Committee, the Senate Conferees felt that the deletion of the word "concerted" from the statute might cast doubt on the validity of traditional, primary picketing. To avoid that result, a proviso specifically protecting primary picketing and primary strikes was inserted by the Conference Committee. In the words of the Conference Report, "The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. The provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law [Citing *Moore Dry Dock* and other common situs cases]." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959).

Thus the Conference Report makes clear that the purpose of the proviso was to preserve the right to engage in primary picketing and primary strikes as defined by the established precedents at the time the new amendments were passed. At that time, as we have seen, it was well established by countless decisions of the Board and the courts that that right included the right to induce employees of other employers, by picketing, by mail, by telegram, or by

any other means, to refuse to enter upon the premises of an employer with whom the union had a legitimate primary dispute.

It is true that the present case was decided by the Board shortly before the new Act was passed, but it was still pending in the Court of Appeals at that time, and there is no evidence in the legislative history that anyone on Capitol Hill was aware of that decision. All the other "contractors' gate" cases were decided only after the new Act was passed. On the other hand, such Board decisions as *Pure Oil, Interborough News,* and *Ryan,* such court of appeals decisions as *Local 618* and *DiGiorgio Fruit Co.,* and this Court's decision in *Rice Milling* were well-known, and when the Congress referred to "primary strikes and primary picketing" it can only have meant to refer to the rules established in those cases.

That Congress understood the "existing law" to be as we have described it is made clear by the explicit discussion of Section 8(b)(4) in the House Report, H.R. Rep. No. 741, 86th Cong., 1st Sess. 779 (1959):

> " 'Primary activities' is a term used to describe a strike or picketing at a plant of the employer engaged in a labor dispute. It is settled law that the National Labor Relations Act does not require a truck driver to cross a primary picket line and that the 'pickets may request him not to enter the strike-bound plant.' (See *NLRB* v. *International Rice Milling Co.,* 341 U.S. 665.) The truck driver's employer would have the legal right to discharge him, or the employer could agree that he would not require the driver to enter the strike-bound plant. These activities are all different from the earlier example [of concerted activity away from the employers' premises] because they are limited to the scene of the labor dispute."

Congress understood also that the special rules govern-

ing common situs situations were not applicable to the ordinary industrial picket line.

> "It is settled law that the employees of a mine or mill owner or in a factory may peacefully picket their place of employment in seeking higher wages, shorter hours, better conditions of employment, or other lawful objectives. So long as their placards are honest, *the pickets do not have to choose their words with an eye to the legal consequences.* They may ask others not to cross the picket lines." id. at 780 (emphasis added.)

It is plain, therefore, that when Congress attached to the amended Section 8(b)(4) a proviso protecting "primary picketing" it intended to protect precisely the kind of conduct involved here: the inducement of employees of other employers not to cross a picket line at the site of a primary dispute.

Indeed, the Conference Report specifically referred to *Moore Dry Dock* as being one of the decisions which it intended to preserve. As we have seen, that case not only laid down restrictions on picketing in common situs situations, but also carefully preserved the right to picket freely at the premises of the primary employer, and specifically reaffirmed the decision of the Board in *Ryan* and other cases in which inducing secondary employees not to work at the site of a primary dispute was held to be lawful.

The fact that the primary picketing proviso was intended to protect such inducements becomes even more clear when that proviso is compared with other provisos which were inserted into the amended act, and which protect picketing or similar conduct in other circumstances.

One of these appears at the end of 8(b)(4), and protects a union's right to publicize the fact that one or more employers are handling or selling products of another employer with whom there is a labor dispute. That pro-

viso specifically provides, however, that the right to publicize that fact exists only "as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." In this proviso, therefore, Congress specifically protected certain conduct only so long as it does not induce work stoppages by secondary employees at the premises of a secondary employer.

A similar proviso was inserted in Section 8(b)(7), 29 U.S.C. §158(b)(7) (Supp. I, 1959), which deals with "organizational" or "recognitional" picketing. That proviso protects picketing for the purpose of informing the public that an employer does not employ members of, or does not have an agreement with a union, "unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services." Again, certain conduct is permitted only as long as it does not induce work stoppages by secondary employees.

It follows that if the primary-picketing proviso had not been intended to protect a union's right to induce employees of other employers not to enter the picketed premises, then Congress would have specifically said so, as it did in these other provisos which deal with picketing and similar conduct in other circumstances. By not putting in the primary picketing proviso qualifying language similar to that in other provisos, Congress manifested its intention to protect primary picketing even though it induces employees of other employers not to cross the picket line.

It is noteworthy also that the proviso in 8(b)(4) which protects publicity directed at consumers ceases to operate only if work stoppages are induced at the premises of *secondary* employers. This reaffirms the fact that inducing

employees of other employers not to enter the premises of a primary employer is not a violation of 8(b)(4).

Our interpretation of the new Act has been confirmed by a man who played a key role in the drafting of that legislation. Professor Archibald Cox of Harvard Law School, a well-known authority in labor law, worked with the Senate sponsors of the legislation from its inception through the final Conference. In a discussion of the Landrum-Griffin amendments to Taft-Hartley he has explained the purpose of the primary picketing proviso as follows:

> "[T]he NLRB and court decisions under the Taft-Hartley Act held that . . . turning people away from the scene of a labor dispute is an incident of a primary strike rather than a secondary boycott. The Supreme Court adopted this interpretation in the *Rice Milling* case, but the opinion stressed the point that Section 8(b)(4)(A) prohibiting inducements to engage in 'a concerted refusal.' Since the Landrum-Griffin bill deleted this phrase, it might have overturned the entire line of decisions if a majority of the Senate Conferees had not secured the inclusion of explicit language safeguarding the right to engage in primary picketing even though truck drivers are stopped by the pickets."

Professor Cox concludes, therefore, that "under the *Rice Milling* case and the new confirmatory proviso, as explained above, it is not an unlawful secondary boycott to induce employees to refuse to cross a primary picket line where the refusal causes the secondary employer to cease doing business with the primary employer *at the site of the labor dispute*." Cox, Law and the National Labor Policy 32, 34 (1960). (Emphasis in original.)

We do not think that Congress intended to make the new Act less restrictive than the old. Rather, Congress wanted to preserve the right—which, until very recently, everyone

assumed existed under the old Act—to induce employees of other employers to refrain from entering the premises of an employer with whom a union had a primary dispute. The Board has now said that all the prior decisions were wrong, and that no such right existed under the old Act. Meanwhile, however, Congress has passed new legislation specifically designed to preserve precisely that right which the Board has now so sharply restricted. Only two conclusions are possible. Either the Board erred in this case and the other recent cases in which the Board has reached a similar result, or Congress in amending Section 8(b)(4) has created a right which did not previously exist under the old law, all cases to the contrary notwithstanding. We submit that the former conclusion is the correct one. In either case, however, the Board's order cannot now be enforced, and its decision must be reversed.

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

DAVID E. FELLER
JERRY D. ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

Attorneys for United Steelworkers of America and International Chemical Workers Union

LE COPY

Office-Supreme Court, U.S.
FILED
FEB 28 1961
JAMES R. BROWNING, Clerk

No. 321

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MELVIN J. WELLES,
Attorney,
National Labor Relations Board, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
A. The Board's findings	2
B. The Board's conclusions and order	6
C. The decision of the court of appeals	6
Summary of argument	6
Argument:	
In the circumstances of this case, the Board had reasonable basis for concluding that the union's conduct at the gate reserved exclusively for the contractors' employees violated Section 8(b)(4)(A) of the National Labor Relations Act	13
A. Introduction	13
B. The evolution of the Board's approach	20
C. The Board's approach, as applied to the facts of this case, achieves a reasonable accommodation as between the right of the union to picket the primary employer and the right of the neutral employer to remain uninvolved in the dispute	32
D. Petitioner's contentions do not impair the validity of the Board's conclusion in this case	40
Conclusion	51
Appendix	53

CITATIONS

Cases:	
10 East 40th St. Co. v. *Callus*, 325 U.S. 578	49
Alpert v. *United Steelworkers*, 141 F. Supp. 447	16
Amalgamated Meat Cutters, Local 88 v. *National Labor Relations Board*, 237 F. 2d 20, certiorari denied, 352 U.S. 1015	37

Cases—Continued

Atomic Projects & Production Workers (New Mexico Building Branch, Associated General Contractors), 120 NLRB 400 (1958) — Page 28

Brewery and Beverage Drivers, Local 67 v. *National Labor Relations Board*, 220 F. 2d 380, enforcing 107 NLRB 299 — 37

Brooks v. *National Labor Relations Board*, 348 U.S. 96 — 50

Chauffeurs, Local No. 135 (Hoosier Petroleum Co.), 106 NLRB 629 (1953) — 25

Chauffeurs, Local 200 (Milwaukee Plywood Co.), 126 NLRB No. 80 — 21

DiGiorgio Fruit Corp. v. *National Labor Relations Board*, 191 F. 2d 642, certiorari denied, 342 U.S. 869 — 21

Douds v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 — 22, 39

General Teamsters, Local 249 (Crump, Inc.), 112 NLRB 311 (1955) — 26

International Brotherhood of Electrical Workers v. *National Labor Relations Board*, 341 U.S. 694, affirming 181 F. 2d 34 — 7, 11, 13, 17, 18, 24, 25, 34, 39, 40, 42

International Brotherhood of Teamsters, Local 87 (Di Giorgio Wine Co.), 87 NLRB 720 (1949) — 21

International Brotherhood of Teamsters, Local 179 (Alexander Warehouse Sales Co.), 128 NLRB No. 105 (1960) — 20

International Brotherhood of Teamsters, Local 201 (International Rice Milling Co.), 84 NLRB 360 (1949) — 20

International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service), 87 NLRB 502 — 8, 20, 23

International Brotherhood of Teamsters, Local 807 (Sterling Beverages, Inc.), 90 NLRB 401 (1950) — 24

John A. Piezonki d/b/a/ Stover Steel Service v. *National Labor Relations Board*, 219 F. 2d 879 — 26

Local No. 36, International Chemical Workers (Virginia-Carolina Chemical Corp.), 126 NLRB No. 117 (1960), enforced (C.A.D.C.), January 17, 1961, petition for certiorari pending, No. 680, this Term — 27, 28

Local Union No. 55, Carpenters (Professional and Business Men's Life Insurance Co.), 108 NLRB 363 (1954) — 26, 35

Local 74, Carpenters Union v. *National Labor Relations Board*, 341 U.S. 707 — 17, 24

Cases—Continued

	Page
Local 618, Automotive Employees Union (Incorporated Oil Co.) v. *National Labor Relations Board*, 249 F. 2d 332	46, 47
Local 1976, Carpenters' Union v. *National Labor Relations Board*, 357 U.S. 93	14, 36
Metal Polishers (Climax Machinery Co.), 86 NLRB 1243 (1949)	38
Milwaukee Plywood Co. v. *National Labor Relations Board*, decided December 20, 1960, 46 LRRM 2291	21, 39
National Labor Relations Board v. *Associated Musicians*, 226 F. 2d 900, certiorari denied, 351 U.S. 962	24
National Labor Relations Board v. *Brewery and Beer Distributor Drivers, Local 830*, 281 F. 2d 319	37
National Labor Relations Board v. *Business Machine Mechanics Conference Board*, 228 F. 2d 553, certiorari denied, 351 U.S. 962	39
National Labor Relations Board v. *Chauffeurs, Local 135*, 212 F. 2d 216	26
National Labor Relations Board v. *Denver Building & Construction Trades Council*, 341 U.S. 675	7, 11, 14, 17, 18, 24, 25, 26, 34, 36, 39, 40, 42, 50
National Labor Relations Board v. *General Drivers, Local 968*, 225 F. 2d 205, certiorari denied, 350 U.S. 914	23
National Labor Relations Board v. *International Hod Carriers, Local 1140*, No. 16,538, decided December 22, 1960, 47 LRRM 2345	24, 37, 47
National Labor Relations Board v. *International Rice Milling Co.*, 341 U.S. 665	6, 9, 11, 13, 15, 20, 24, 41, 42, 45
National Labor Relations Board v. *Local 135, Teamsters*, 267 F. 2d 870, certiorari denied, 361 U.S. 914	36
National Labor Relations Board v. *Local 294, International Brotherhood of Teamsters*, No. 26,130, decided November 10, 1960, 47 LRRM 2085	16, 24
National Labor Relations Board v. *Local Union No. 55*, 218 F. 2d 226	26
National Labor Relations Board v. *Seafarers' International Union*, 273 F. 2d 891, certiorari denied, 364 U.S. 816	24

Cases—Continued

	Page
National Labor Relations Board v. *Service Trade Chauffeurs, Local 145*, 191 F. 2d 65, 199 F. 2d 709	24
National Labor Relations Board v. *Truck Drivers Local Union No. 449*, 353 U.S. 87	50
National Labor Relations Board v. *Truck Drivers, Local 728 (National Trucking Co.)*, 228 F. 2d 791	24
National Labor Relations Board v. *United Brotherhood of Carpenters*, 184 F. 2d 60, certiorari denied, 341 U.S. 947	15, 21
National Labor Relations Board v. *United Steelworkers of America, Local 5246*, 250 F. 2d 184	24, 37
National Labor Relations Board v. *Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584	37
Newspaper and Mail Deliverers' Union (Interborough News Co.), 90 NLRB 2135 (1950)	21, 43
Office Employees International Union v. *National Labor Relations Board*, 262 F. 2d 931	28
Oil Workers International Union, Local 346 (The Pure Oil Co.), 84 NLRB 315 (1949)	21
Printing Specialties and Paper Converters Union, Local 388 v. *Le Baron*, 171 F. 2d 331	21, 37
Printing Specialties Union, Local 388 (Sealright Pacific, Ltd.), 82 NLRB 271 (1949)	21, 37, 38
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	50
Retail Fruit & Vegetable Clerks Union, Local 1017 v. *National Labor Relations Board*, 249 F. 2d 591	27, 28
Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market), 116 NLRB 356 (1956)	26, 27, 42, 44
Roy, J. G., & Sons Co. v. *National Labor Relations Board*, 251 F. 2d 771	39
Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547 (1950)	9, 16, 23, 46
Sales Drivers, Local 859 v. *National Labor Relations Board*, 229 F. 2d 514, certiorari denied, 351 U.S. 972	23
Seafarers International Union (Salt Dome Production Co.) v. *National Labor Relations Board*, 265 F. 2d 585	46, 48

Cases—Continued

	Page
Securities & Exchange Commission v. *Chenery Corporation*, 332 U.S. 194	12, 51
Truck Drivers, Local 728 (Campbell Coal Co.) v. *National Labor Relations Board*, 249 F. 2d 512, certiorari denied, 355 U.S. 958	24, 37
Truck Drivers, Local 728 (Genuine Parts) v. *National Labor Relations Board*, 265 F. 2d 439, certiorari denied, 361 U.S. 917	37
Union de Trabajadores (Gonzales Chemical Industries, Inc.), 128 NLRB No. 116 (1960)	29, 30
United Brick & Clay Workers v. *Deena Artware*, 198 F. 2d 637, certiorari denied, 344 U.S. 897	25
United Brotherhood of Carpenters (Wadsworth Building Co.), 81 NLRB 802 (1949)	21
United Electrical Workers, Local 813 (Ryan Construction Corp.), 85 NLRB 417 (1949)	22, 25, 27, 42
United Steelworkers of America (Phelps Dodge Refining Corp.), 126 NLRB No. 168	28
Washington Coca Cola Bottling Works, Inc., 107 NLRB 299	46

Statutes:

National Labor Relations Act, as amended, 1947 (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
Section 8(b)(4)(A)	2, 6, 7, 9, 12, 13, 14, 15, 17, 18, 21, 24, 25, 26, 29, 31, 33, 34, 36, 37, 39, 41, 43, 44, 45, 53.
National Labor Relations Act, as amended, 1959 (73 Stat. 519, 542, 29 U.S.C. 158, Supp. I):	
Section 8(b)(4)(B)	12, 13, 42, 44, 45, 54

Miscellaneous:

Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086 (1960)	45
93 Cong. Rec. 4197–4198, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O. 1948), 1104–1109	14, 33, 38
Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 Yale L.J. 341 (1938)	14
I Leg. History of the Labor Management Reporting and Disclosure Act of 1959 (G.P.O. 1959), p. 942, H. Rep. No. 1147, 86th Cong., 1st Sess., 38	46–47

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 321

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 194–200) is reported at 278 F. 2d 282. The decision and order of the Board (R. 37–46) are reported at 123 NLRB 1547.

JURISDICTION

The judgment below was entered on April 18, 1960 (R. 200–201). The time for filing a petition for certiorari was extended by order of Mr. Justice Black, dated July 8, 1960, to August 16, 1960. The petition was filed on August 12, 1960, and was granted on October 24, 1960, 364 U.S. 869 (R. 206). The jurisdiction

of this Court rests upon 28 U.S.C. 1254 and Section 10 (e) and (f) of the National Labor Relations Act (61 Stat. 146, 29 U.S.C. 160 (e) and (f)).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 53–54.

QUESTION PRESENTED

The union (petitioner) picketed the premises of the employer (respondent General Electric) with whom it was engaged in a labor dispute at gates used by the primary employees and also at a gate reserved exclusively for independent contractors and their employees, who were regularly working on those premises. The question presented is whether in the circumstances the Board had a reasonable basis for concluding that the picketing and related appeals at the contractors' gate exceeded the bounds of legitimate primary activity and were thus proscribed by Section 8(b)(4)(A) of the National Labor Relations Act.

STATEMENT

A. *The Board's findings*

The General Electric Company is engaged in the manufacture of household appliances at its plant, known as "Appliance Park," located about ten miles from Louisville, Kentucky (R. 38; 51, 57). The operation requires retooling and revamping of the manufacturing facilities for model changes as well as considerable maintenance, installation, and repair and

alteration work of various types (R. 13, 14, 38; 55–57). Because its maintenance division lacked either the necessary skills or sufficient manpower to perform these diversified functions, the company contracted with local concerns for the needed services (R. 38; 55, 56).

In July 1958, when the strike against General Electric (described *infra*) started, the company had outstanding agreements with twelve independent contractors. Six of the contractors had already commenced work on major projects, *e.g.*, construction of the mezzanine floor of a building, building a truck dock, erecting an air shelter, and rearranging a conveyor line (R. 39; 121, 122, 127–130, 131). Some of the contractors had maintained business relations with the company for a period of years—one, for example, for five or six years, with a force that varied from one to fifty men. At the time of the strike, some of the contractors' employees had been at the plant a year or more (R. 39; 80–81, 90, 100–104).

A large ditch surrounds the company's property so that access to the plant by vehicles is limited to five roadways across culverts; these are designated as "gates" and are numbered 2, 3, 3–A, 4, and 5 (R. 13, 36, 38; 51, 52, 65, 170–171). Rules of the company authorized its employees to use gates 2, 3, 4, and 5, but *not* gate 3–A, and limited the independent contractors, their employees and their suppliers to entry at gate 3–A (R. 17, 39, 40, 42; 51, 52, 54–55, 69–70, 72, 100, 103, 107, 113, 118–119, 187–188, 189). Over a period of years, jurisdictional and other labor disputes

585131—61——2

involving the contractors had resulted in numerous strikes at the plant. By restricting gate 3-A to those employees, the company sought to minimize the possibility of picketing at the regular entrances in the event that the contractors and their employees had disputes (R. 39; 66–67, 179–181).

In January 1954, written instructions were issued to the plant guards, limiting gate 3–A to independent contractors and their employees (R. 39; 59, 179–187). Unless recognized by the guards, passengers in a vehicle entering gate 3–A were required to identify themselves as contractor personnel, and a check was made against registration cards maintained at the guardhouse for this purpose (R. 40; 52, 55, 71, 107, 109–110).

In January 1958, a sign was posted at gate 3–A which read as follows:

GATE 3–A
FOR EMPLOYEES
OF CONTRACTORS
—ONLY—
G.E. EMPLOYEES
USE OTHER GATES

Similar signs have been posted at that entrance since 1953 (R. 40; 52–53, 170–171).

On July 27, 1958, petitioner union called a strike of the company's own employees, and pickets were stationed at all entrances to the plant including gate 3–A (R. 13, 38, 41; 49, 61, 133). The pickets carried signs reading (R. 41; 49, 132–134, 170–171):

LOCAL 761
ON STRIKE
G.E. UNFAIR

In addition to the picketing, oral appeals were made at gate 3–A to the employees of the independent contractors, importuning them not to cross the picket line. Thus, employees of Wehr Constructors seeking to enter at gate 3–A in order to report to work were told to "go home" (R. 41; 105–106). The driver of one car pointed to his contractor's identification sticker, but the pickets "didn't ask me anything, shook their heads, and that was all" (R. 78). When employees of another contractor, Heffernan, attempted to enter at gate 3–A, they were told by a picket they could not go in (R. 96–97). In order to get their tools, they were required to obtain a pass at the union hall (R. 97–99). An employee of a third contractor, Service Erection, was similarly stopped by the picket and told that he had to get a pass at the union hall. Later, a representative of Service, fearing its contract would be cancelled unless work was continued, conferred with representatives of petitioner in an effort to obtain permission for Service's employees to complete the project. After several meetings, the union representatives said that they would have to take the matter up with the executive board. Permission was not given and the employees of Service refused to resume work until conclusion of the strike (R. 87–89, 90–94).

Most, if not all, of the employees of independent contractors respected the picket line at gate 3–A (R. 17, 41; 63, 87, 89, 94, 132). Picketing at that entrance was discontinued on August 9, 1958, pursuant to a temporary restraining order issued by a federal district court under Section 10(e) of the Act (R. 41; 49, 133, 134).

B. *The Board's conclusions and order*

On these facts, the Board found that petitioner's picketing and related activity at gate 3–A, which was known to be set apart for the use of the independent contractors and their employees, was designed to enmesh the contractors in petitioner's dispute with General Electric. It concluded that, in the circumstances shown, the picketing at gate 3–A was not legitimate primary activity, but, rather, secondary activity proscribed by Section 8(b)(4)(A) of the Act. The petitioner was ordered to cease and desist from the unfair labor practices found and to post appropriate notices. (R. 37–46.)

C. *The decision of the court of appeals*

Upon its review of the record, the court of appeals concluded that the Board's findings were fully supported by the evidence and that the Board was warranted in holding, on the particular facts found, that the challenged activity of the union was directed peculiarly to the inducement of concerted action by neutral or secondary employees. On this basis, the court sustained the Board's determination that the case fell within the "range" of Section 8(b)(4)(A), and enforced its order. (R. 194–200.)

SUMMARY OF ARGUMENT

A. Read literally, Section 8(b)(4)(A) of the National Labor Relations Act would ban all strikes and picketing. However, it is well settled that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary [or primary] strike" (*National Labor Relations*

Board v. *International Rice Milling Co.*, 341 U.S. 665, 672), but only to condemn the "secondary boycott" (*International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705).

Accordingly, in applying Section 8(b)(4)(A), the initial question is whether the challenged activity is "primary" or "secondary." Congress did not define these terms, but left to the Board the task of giving them content through the empiric process of administration. The Board's function is to accommodate "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692.

The line between permissible primary and illegal secondary activity is easy to draw when the primary employer and the neutral employer conduct their businesses at separate locations. It is far more difficult to draw when the primary employer and the neutral employer are at work on the same premises. Picketing at those premises will necessarily have a substantial impact on the neutral and his employees. But, unless the union can picket at the common project, its right to picket the primary employer may be illusory for that project is frequently his only place of business in the area of the dispute. The Board has sought to meet this problem with an eye to practicalities—by treating picketing at a common

work project as primary so long as every reasonable effort is made to confine it to the primary employer, and as secondary when there is a direct and purposeful effort to involve the neutral employer in the dispute.

The union assumes that its right to picket the premises of the primary employer in this case is an unqualified right. The Board believes, on the other hand, that it properly took into account the fact that independent contractors work at the premises on a regular basis. This fact lies at the root of its holding that the union's picketing at the General Electric premises exceeded the bounds of legitimate primary activity when the union extended its picketing and its appeals to a gate used exclusively by the employees of the neutral independent contractors. The Board's conclusion, we urge, represents a reasonable accommodation of conflicting interests.

B. The Board has long recognized that the right to engage in picketing in support of a labor dispute with the primary employer includes the right not only to appeal to the employees of the primary employer, but also "to influence third persons to withhold their business or services from the struck employer." *International Brotherhood of Teamsters, Local 807* (*Schultz Refrigerated Service*), 87 NLRB 502, 505 (1949). In order to afford the union an adequate opportunity to make these appeals, and yet at the same time to prevent the area of the dispute from becoming unduly enlarged, the Board, at an early date, adopted geography as one of the basic

tests of primary-secondary activity. Thus, picketing at the primary employer's plant was viewed as primary, and picketing at the premises of a neutral employer as secondary.

The geographic test was, at first, rigidly applied, and no differentiation was made in the situation where (as here) the neutral employees' contacts with the primary premises were regular and continuous rather than transitory. However, the Board did give consideration to the interests of the neutral employer in other situations where he shared premises with the primary employer. Thus, where the primary employer was a subcontractor who worked along with other contractors on a construction project, or where the primary employer's business was mobile and had temporarily moved to the premises of another employer, the Board concluded that "the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute." *Sailors' Union of the Pacific* (*Moore Dry Dock Co.*) 92 NLRB 547, 549 (1950). Accordingly, in these situations it was held that the union could lawfully picket at the shared premises if it confined its activity, so far as practicable, to the primary employer's business.

In 1951, in the *Rice Milling, Denver* and *Electrical Workers* cases, 341 U.S. 665, 675, 694, this Court held (a) that Section 8(b)(4)(A) did not interdict primary activity, but (b) that an accommodation had to be made in the construction project cases because of the regular and concurrent presence of both primary and secondary employees at the same location.

In the light of those holdings, the Board has concluded that there is no basis for a hard and fast distinction between the case where the primary employer has come on someone else's premises and the case where his own premises have become a common work site. In both situations, the practicalities may require, in a given case, that neither the right of the union, nor that of the neutral, shall be given unlimited scope.

C. On the facts of this case, the Board's order represents a reasonable accommodation of the competing interests involved. General Electric's Appliance Park was a regular work place for the contractors' employees, no less than for General Electric's employees. The picketing at these premises could therefore be expected to have far greater impact on the contractors' employees than it would on a deliveryman or serviceman making a brief appearance there. And the union's action in extending the picketing to the gate used exclusively by neutral employees and stopping those workers as they proposed to enter was bound to increase substantially the prospect of injury to the neutral employers. In these circumstances, the interests of the contractors were entitled to recognition at the General Electric premises. This can be done and still leave the union with adequate room for the exercise of its right to engage in primary activity against General Electric. Requiring the union to confine its picketing, so far as practicable, to General Electric and to refrain from action which focuses

upon neutral contractors at the site, permits it to continue to picket at the four other gates to the premises, where its appeal can still reach all of the areas which primary activity customarily reaches.

Contrary to petitioner's suggestion, the situation here is essentially similar to that in *Denver* and *Electrical Workers, supra.* There, as here, the same premises were the regular work site for a number of different employers and their employees. In these circumstances, neither the right of the union to engage in primary activity nor the right of the neutral employers to remain free of pressure can be deemed absolute. Nor can the construction project cases be realistically distinguished on the ground that there the neutral employers were not directly performing work for the primary employer on his own premises.

D. The Board's decision here is entirely consistent with the decision of this Court in *Rice Milling,* 341 U.S. 665. Here, the primary employer's premises were not only his work place, but also the regular work place of several neutral employers. In consequence, the picketing had more substantial impact on the neutral employees than if they had been the employees of suppliers who "happen[ed] to approach the picketed place of business" (341 U.S. at 673). Accordingly, it was appropriate to treat the General Electric premises not solely as a work site for the primary employer, as in *Rice Milling,* but as a common

585131—61——3

work site, and to make an accommodation for the rights of the neutrals at work there, as in *Denver* and *Electrical Workers.*

Nor is the Board's decision affected by the 1959 amendments to the Act which added a proviso to Section 8(b)(4) preserving the lawfulness of "any primary strike or primary picketing." The proviso does not define "primary," but merely sets forth in the statute the principle which has governed the decisions of the Board and the courts since Section 8(b)(4)(A) was first inserted in the Act in 1947. It remains the Board's duty, by the process of inclusion and exclusion, to draw reasonable and meaningful distinctions, on the basis of the particular facts involved, between primary and secondary activity. The practical accommodation of the competing interests involved—the right of the union to picket the primary employer and the right of unoffending neutral employers to be shielded from the controversy—calls for the application of an expert administrative judgment. Since the Board's decision reflects its experience, its appreciation of the complexities of the problem, its awareness of the Congressional policies to be served and a careful evaluation of the total factual situation, it has made an "allowable judgment." *Securities & Exchange Commission* v. *Chenery Corporation,* 332 U.S. 194, 209.

ARGUMENT

IN THE CIRCUMSTANCES OF THIS CASE, THE BOARD HAD REASONABLE BASIS FOR CONCLUDING THAT THE UNION'S CONDUCT AT THE GATE RESERVED EXCLUSIVELY FOR THE CONTRACTORS' EMPLOYEES VIOLATED SECTION 8(b)(4)(A) OF THE NATIONAL LABOR RELATIONS ACT

A. *Introduction*

Section 8(b)(4)(A) of the National Labor Relations Act[1] provides that it shall be an unfair labor practice for a labor organization:

> * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person; * * *.

Read literally, this provision would ban all strikes and picketing. It is well settled, however, that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary [or primary] strike" (*National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 672), but only to condemn the "secondary boycott" (*International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694,

[1] This case arises under the provision as it existed prior to its amendment in 1959, 73 Stat. 519, Sec. 704(a). As we point out *infra*, pp. 44–46, the 1959 modifications do not affect the decision herein.

705). Moreover, not all secondary boycotts are proscribed, but only those achieved by "the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods." *Local 1976, Carpenters Union* v. *National Labor Relations Board,* 357 U.S. 93, 100.

Accordingly, in applying Section 8(b)(4)(A), the threshold question is whether the challenged activity is "primary" or "secondary." Congress did not define these terms, which had a varying meaning at common law.[2] Instead, it left to the Board the task of giving content to the terms through the empiric process of administration. The Board's function is to accommodate "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 692.[3]

---

[2] See Hellerstein, *Secondary Boycotts in Labor Disputes,* 47 Yale L.J. 341 (1938); 93 Cong. Rec. 4198–4199, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O. 1948), pp. 1106–1109.

[3] This passage from *Denver* negates petitioner's contention (Br. 45–46, 100–103) that the Board lacks power to give content to the terms primary and secondary by balancing the conflicting interests involved, because Congress, although it did not define those terms in the statute, did so in the legislative history of the Act. Furthermore, an examination of the legislative history (Br. 22–30) fails to reveal the clear guidelines which petitioner purports to find therein. To be sure, the

The line between permissible primary and illegal secondary activity is readily drawn where the primary employer and the neutral employer conduct their businesses at separate locations. In this situation, picketing and allied activity confined to the premises of the primary employer is permissible; its extension to the premises of the neutral employer is not. Compare *National Labor Relations Board* v. *Internatonal Rice Milling Co.*, 341 U.S. 665, with *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 184 F. 2d 60 (C.A. 10), certiorari denied, 341 U.S. 947.

The line is more difficult to draw where the primary employer and the neutral employer are at work on the same premises. Picketing at those premises will necessarily bear upon the neutral and his employees, for even picketing directed principally at the primary employer is bound to have some impact upon neutral employees at the site (see pp. 22–24, *infra*). But unless the union can picket at the common project, its right to picket the primary employer may be largely destroyed, for that project is frequently his only place of business in the area of the dispute. The Board has met this problem by treating picketing

---

history reflects an intention to limit Section 8(b)(4)(A) to secondary boycotts and not to proscribe the primary strike. But the examples given of each are the classic cases where there is a geographic separation between the businesses of the primary employer and those of the neutral employer. Nothing in the legislative history explains where the line between primary and secondary activity is to be drawn in the situation here, where both employers are at work on the same premises.

at a common work project as primary so long as every effort is made to confine it to the primary employer, and as secondary when there is a further direct and purposeful effort to involve the neutral employer in the dispute.[4] Under this approach, if neutral employees stop work as a result of picketing at a common project, it becomes a question of fact in each case as to whether the stoppage occurred as an incident of picketing the primary employer (*i.e.*, the employees were induced to make common cause with the union in its struggle against the primary employer), or because the secondary employees were drawn into the dispute to a greater extent than primary picketing would necessarily involve.[5]

---

[4] Thus, in *Sailors' Union of the Pacific* (*Moore Dry Dock Co.*), 92 NLRB 547 (1950), the Board, in finding that the picketing of the primary employer's ship at a repair dock owned by a neutral employer was primary, stated (p. 549):

> In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer. All these conditions were met in the present case. [Footnotes omitted.]

[5] See *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters* (C.A. 2), No. 26130, decided November 10, 1960, 47 LRRM 2085, 2086–2087; *Alpert* v. *United Steelworkers*, 141 F. Supp. 447, 452 (D. Mass.).

The latter was the situation in the *Denver* and *Electrical Workers* cases, *supra*. In both cases, the union had a dispute with a subcontractor who was working on a construction project along with the general contractor and other subcontractors; it picketed the project with signs describing the entire job as unfair, and, as a result of the picketing, the employees of the neutral contractors walked off. From the fact that the picketing did not clearly identify the primary employer and other evidence showing a dominant purpose to extend the dispute,[6] the Board found (and this Court sustained the finding) that the picketing was aimed at the neutral contractors. Hence, it exceeded the bounds of legitimate primary activity and fell within the ban of Section 8(b)(4)(A).[7]

Here, as in *Denver* and *Electrical Workers*, the picketing occurred at premises which were a work site not only of the primary employer, General Electric, but also of the neutral contractors, many of whom had been working there for several years prior to the present dispute. Moreover, as in those cases, there was cogent evidence that the Union did not confine

---

[6] In *Denver*, prior to the picketing, the Council, comprising unions representing the employees of the neutral contractors, had decided to strike the project in order to enforce the provision of its bylaws barring union men from working with non-union men, and it was agreed that the picketing would constitute the strike signal (341 U.S. at 678–679). In *Electrical Workers*, the picketing was carried on at a time when none of the primary employer's employees were on the job (341 U.S. at 696; 181 F. 2d 34, 37 (C.A. 2)).

[7] See, also, *Local 74, Carpenters Union* v. *National Labor Relations Board*, 341 U.S. 707.

its picketing, insofar as possible, to General Electric, but engaged in a strong and deliberate effort to involve the neutral contractors in the controversy (see pp. 4–5, *supra*). Accordingly, the Board concluded, and the court below agreed, that, as in *Denver* and *Electrical Workers*, the union's activity at the gate reserved exclusively for the contractors and their employees violated Section 8(b)(4)(A).

It is petitioner's position, however, that *Denver* and *Electrical Workers* are inapposite because the neutrals there were not performing work for the primary employer directly, at his own premises (Br. 57–58). Thus, it argues that the right to engage in primary activity, which the Act safeguards, includes the right to conduct a campaign at the primary employer's premises to induce the employees of other employers who are permanently at work there to go on strike, even though the campaign is not part of the appeal to the employees of the primary employer. Accordingly, it concludes that it may not only lawfully picket the entire premises of the primary employer, but that it may also make every effort to induce the employees of the neutral employers not to cross or work behind the picket line. On this view, the requirement, applied in other common-work-site cases, that the picketing be conducted with due regard for the interests of neutrals steadily at work there, is inapplicable whenever the site belongs to the primary employer and the neutral contractors are engaged in doing work for him.

The Board believes, on the other hand, that the ownership of the premises is not important in drawing

the line between legitimate primary and illegal secondary activity at a common work site. Nor is it controlling that the work being done by the neutral is *for* the primary employer. The important consideration, in the Board's view, is whether a neutral employer uses the premises, along with the primary employer, in a substantial and continuous manner as a regular work place; if he does, his interests are entitled to protection there, no less than those of the primary employer.[8]

[8] The issue is not, as petitioner asserts (Br. 20–21), whether "the Board is empowered to declare that the only legitimate object of primary picketing at a manufacturing establishment is to induce employees and prospective employees of the primary employer to make common cause with the strikers or pickets." As we shall show, the Board recognizes that a picket line may legitimately appeal to the employees of neutral employers. The question is whether that appeal is made as an incident of picketing the primary employer, or as part of a purposeful effort to enmesh the neutral employers in the dispute. In the Board's view, all picketing and allied activity at the premises of the primary employer may ordinarily be regarded as making only an "incidental" appeal to neutral employees coming to those premises with deliveries or to perform services. However, the Board believes that where the neutral employees work on the premises in a regular manner the picketing, insofar as they are concerned, may exceed the "incidental" and become "secondary" if, instead of attempting to confine that activity to the primary employer, the union unnecessarily directs it at the neutral employers at work there. Petitioner, on the other hand, would treat as privileged even picketing expressly directed at those employers, merely because they happened to be on the primary employer's premises and performing work for him there.

585131—61——4

B. *The evolution of the Board's approach*

The Board recognized, at an early date, that the right to engage in picketing and allied activity in support of a labor dispute with the primary employer includes the right not only to appeal to the employees of the primary employer, but also "to influence third persons to withhold their business or services from the struck employer." *International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 NLRB 502, 505 (1949).[9] The problem was to afford the union an adequate opportunity to make these appeals, and yet to prevent the area of the dispute from becoming unduly enlarged, to the detriment of netural employers. Since the primary employer's own premises ordinarily furnish the union with ample access to those working for, supplying and servicing the primary employer's business, there is no justification, in the ordinary case, for extending the union's activity to other premises. Accordingly, the Board adopted geography as one of the basic tests for determining whether the activity was to be characterized as primary or secondary.

Thus, picketing at the primary employer's plant and appeals by the pickets to the employees of suppliers not to make deliveries there were viewed as legitimate primary activity.[10] Similarly, appeals or

[9] See, also, *International Brotherhood of Teamsters, Local 179 (Alexander Warehouse Sales Co.)*, 128 NLRB No. 105, August 25, 1960.

[10] *International Brotherhood of Teamsters, Local 201 (International Rice Milling Co.)*, 84 NLRB 360 (1949), affirmed, *sub nom. National Labor Relations Board* v. *International Rice*

directions, though away from the picket line, not to make pick-ups or deliveries at the primary premises were viewed as primary, since they invited action only at those premises.[11] On the other hand, where the union went to the premises of a neutral employer and there sought, by picketing and other means, to induce the neutral's employees not to handle products manufactured in the primary employer's plant, the activity was viewed as having the secondary object proscribed by Section 8(b)(4)(A).[12]

The geographic test was, at first, rigidly applied, and no differentiation was made in the situation where, as here, the neutral employees do not merely have transitory contracts with the primary premises, but work there on a regular basis. Thus, in *Oil Workers International Union, Local 346 (The Pure Oil Co.)*, 84 NLRB 315 (1949), the Board found that picketing of Standard Oil at its dock was primary notwith-

---

Milling Co., 341 U.S. 665; *International Brotherhood of Teamsters, Local 87 (DiGiorgio Wine Co.)*, 87 NLRB 720 (1949), affirmed, *sub nom. Di Giorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 648–649 (C.A.D.C.), certiorari denied, 342 U.S. 869.

[11] *Newspaper and Mail Deliverers' Union (Interborough News Co.)*, 90 NLRB 2185 (1950); *Chauffeurs, Local 200 (Milwaukee Plywood Co.)*, 126 NLRB No. 80, enforced, *sub nom. Milwaukee Plywood Co.* v. *National Labor Relations Board*, (C.A. 7), decided December 20, 1960, 47 LRRM 2291.

[12] *Printing Specialties Union, Local 388 (Sealright Pacific, Ltd.)*, 82 NLRB 271 (1949), Section 10(l) injunction sustained, 171 F. 2d 331 (C.A. 9); *United Brotherhood of Carpenters (Wadsworth Building Co.)*, 81 NLRB 802 (1949), enforced, *sub nom. National Labor Relations Board* v. *United Brotherhood of Carpenters*, 184 F. 2d 60 (C.A. 10), certiorari denied, 341 U.S. 947.

standing the fact that it also induced Pure Oil's employees, who were performing work for their employer at that dock, to stop work.[13] And in *United Electrical Workers, Local 813 (Ryan Construction Corp.)*, 85 NLRB 417 (1949), the Board found that picketing of the premises of the primary employer, Bucyrus, was permissible even when extended to a gate which had been established for the use of the employees of Ryan, an independent contractor who was performing construction work for Bucyrus.[14]

The Board did, however, give consideration to the interests of the neutral employer in other situations where he shared premises with the primary employer. Where the primary employer was a subcontractor who worked along with other subcontractors and the general contractor on premises belonging to a third party, or where the primary employer's business was mobile and had temporarily moved to the premises of another employer (*e.g.*, a ship in drydock or a truck making deliveries at retail stores), the Board concluded that "the right of neither the union to picket nor of the secondary employer to be free from picket-

[13] There was evidence that the work performed by Pure Oil employees would have been done by Standard's employees but for the strike against Standard (84 NLRB at 316-317). Cf. *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y.).

[14] In addition to relying on the circumstance that the picketing was conducted at the primary employer's premises with signs directed at Bucyrus, the Board pointed out that, "although only Ryan employees and suppliers had in fact used the Ryan gate before picketing started, Bucyrus employees could always also have entered this gate in order to reach their job location" (85 NLRB at 419).

ing can be absolute." *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549 (1950). The union, it was concluded, could lawfully picket at the shared premises only if it clearly indicated that its dispute was only with the primary employer and sought to confine its activity, so far as practicable, to the primary employer's business.

In *Moore Dry Dock*, the Board formulated a number of criteria for determining whether the union's picketing in these "shared-premises" cases was primary or secondary (see n. 4, *supra*). The courts of appeals, although approving these criteria, made clear that they were merely evidentiary guides and did not preclude the consideration of other relevant factors.[15] The approach was this: if the union limited its picketing to occasions when the primary employer was on the same premises, used signs which referred only to the primary employer, and did not make any overt appeals to the neutral employers or their employees, the picketing would be found to have a primary object;[16] on the other hand, if the picket signs characterized the entire job as unfair,[17] the picketing was carried on after the primary employer had left the

---

[15] See *Sales Drivers, Local 859* v. *National Labor Relations Board*, 229 F. 2d 514 (C.A.D.C.), certiorari denied, 351 U.S. 972; *National Labor Relations Board* v. *General Drivers, Local 968*, 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914.

[16] *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950); *International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 NLRB 502 (1949).

[17] See the *Denver* and *Electrical Workers* cases, discussed p. 17, *supra*.

premises,[18] or there was other evidence that the union activity was strongly directed at the neutral employer and his employees,[19] the picketing would be found to have a secondary object.

After this Court's decisions, in 1951, in the *Rice Milling, Denver* and *Electrical Workers* cases, *supra*, the Board re-evaluated its approach to common work projects and concluded that it could not draw a hard and fast distinction between the situation where the primary employer has come onto someone else's premises and that where his own premises become a common work site.[20] This view is reflected in a series of cases.

---

[18] *International Brotherhood of Teamsters, Local 807 (Sterling Beverages, Inc.)*, 90 NLRB 401 (1950); *National Labor Relations Board* v. *Service Trade Chauffeurs, Local 145*, 191 F. 2d 65, 199 F. 2d 709 (C.A. 2). Cf. *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900 (C.A. 2), certiorari denied, 351 U.S. 962.

[19] *Truck Drivers, Local 728 (Campbell Coal Co.)* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A.D.C.), certiorari denied, 355 U.S. 958; *National Labor Relations Board* v. *Truck Drivers, Local 728 (National Trucking Co.)*, 228 F. 2d 791 (C.A. 5); *National Labor Relations Board* v. *Seafarers' International Union*, 273 F. 2d 891, 894 *ff.* (C.A. 5), certiorari denied, 364 U.S. 816; *National Labor Relations Board* v. *United Steelworkers*, 250 F. 2d 184 (C.A. 1); *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters* (C.A. 2), No. 26130, decided November 10, 1960, 47 LRRM 2085; *National Labor Relations Board* v. *International Hod Carriers, Local 1140* (C.A. 8), No. 16538, decided December 22, 1960, 47 LRRM 2345. See, also, *Local 74, Carpenters Union* v. *National Labor Relations Board*, 341 U.S. 707.

[20] In affirming the Board's holding in *Rice Milling* that picketing and allied appeals at the primary employer's plant was not proscribed by Section 8(b)(4)(A), this Court stated that

Thus, in *Hoosier Pete*,[21] Floyd owned truck tractors which he used to haul gas and oil for Hoosier Pete, in the latter's tank trailers, to filling stations owned by Hoosier Pete. Floyd kept his tractors and maintained a regular place of business at one of Hoosier Pete's stations. The union, having a dispute with Floyd, picketed the premises used jointly by Floyd and Hoosier Pete. The messages on the pickets' signs were not limited to Floyd, and the pickets made direct attempts to stop truckdrivers from "gassing up" at Hoosier Pete's pumps. The Board—finding that Floyd and Hoosier Pete were independent entities, and that the picketing was aimed not only at Floyd, but also at the neutral, Hoosier Pete—ruled that the fact that Floyd maintained a regular place of business on the premises involved did not, in and of itself, protect the direct action against Hoosier Pete and therefore concluded that the union had violated Section 8(b)(4)

---

the "limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive" (341 U.S. at 671). Moreover, in sustaining the finding of a violation in *Denver*, the Court rejected the contention, advanced by the union and accepted by the dissenting Justices, that, since the picketing was confined to the job where the labor dispute arose and did not spread to another front, it was primary activity (see 341 U.S. at 693). Finally, Judge Clark, in dissenting in *Electrical Workers*, 181 F. 2d 34 (C.A. 2), affirmed, 341 U.S. 694, pointed out that to have one rule for enmeshed employment in the building and construction situation and another for the situation in *Ryan*, *supra*, was anomalous (181 F. 2d at 41). And see *United Brick & Clay Workers* v. *Deena Artware*, 198 F. 2d 637, 641-643 (C.A. 6), certiorari denied, 344 U.S. 897.

[21] *Chauffeurs, Local No. 135 (Hoosier Petroleum Co.)* 106 NLRB 629 (1953).

(A). The Board's order was enforced by the Seventh Circuit.[22]

In *PBM*,[23] an insurance company owned the premises and acted as its own general contractor in constructing homes on the land, employing some nonunion men directly and subcontracting the balance of the work to union subcontractors. The union picketed the job site with signs characterizing the entire job as unfair, causing the employees of the union subcontractors to walk off the job. Concluding that the situation was essentially like that in *Denver*, notwithstanding the fact that the dispute was with the general contractor who owned and controlled the premises, the Board found that the picketing was directed at the union subcontractors and contrary to Section 8(b)(4)(A). The Tenth Circuit agreed.[24]

In *Crystal Palace*,[25] Local 648 had a dispute with a number of the shops located in a large market building. Some of these shops were owned by Long, who also owned the building, and some were owned by persons who leased space from Long. The union placed pickets not only in front of market entrances which were adjacent to the shops involved in the dis-

---

[22] *National Labor Relations Board* v. *Chauffeurs, Local 135*, 212 F. 2d 216 (C.A. 7).

[23] *Local Union No. 55, Carpenters (Professional and Business Men's Life Insurance Co.)*, 108 NLRB 363 (1954).

[24] *National Labor Relations Board* v. *Local Union No. 55*, 218 F. 2d 226 (C.A. 10). See, also, *John A. Piezonki d/b/a Stover Steel Service* v. *National Labor Relations Board*, 219 F. 2d 879 (C.A. 4); *General Teamsters, Local 249 (Crump, Inc.)*, 112 NLRB 311 (1955).

[25] *Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market)*, 116 NLRB 856 (1956).

pute, but also in front of those which served neutral shops. Moreover, it enlisted the aid of Local 1017, which represented the employees of the latter shops. As a result, those employees refused to cross the picket line and to perform work for their employers. The Board found that the picketing was substantially directed at the neutral shop owners and came within the ban of Section 8(b)(4)(A). Answering the contention that the rules applicable to common situs cases—which require the union to "exercise its right to picket with restraint consistent with the right of neutral employers to remain uninvolved in the dispute"[26]—ought not be applied because the picketing occurred at the primary employer's premises, the Board stated (116 NLRB at 859):

> We believe * * * that the foregoing principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer. We can see no logical reason why the legality of such picketing should depend on title to property. The impact on neutral employees of picketing which deviates from the standards outlined above is the same whether the common premises are owned by their own employer or by the primary employer.[27]

---

[26] *Retail Fruit & Vegetable Clerks Union, Local 1017* v. *National Labor Relations Board*, 249 F. 2d 591, 599 (C.A. 9).

[27] The Board added (116 NLRB at 859) that, to the extent that its earlier decision in *Ryan* was inconsistent, it was no longer adhering to that decision. See, also, *Local No. 36, International Chemical Workers* (*Virginia-Carolina Chemical Corp.*), 126 NLRB No. 117, March 2, 1960, enforced (C.A.D.C.), January 17, 1961, petition for certiorari pending, No. 680, this term.

The Board's order was enforced by the Ninth Circuit.[28]

The approach illustrated by the foregoing cases was then applied to the situation presented here, *i.e.*, where a neutral employer and his employees are engaged in work on the primary employer's premises in a continuous and substantial manner, making it in substance their regular work place. Here, as in other shared-work situations, the Board has undertaken to determine whether the picketing was confined, so far as practicable, to the primary employer's business, or whether a direct and substantial attempt was made to extend the dispute to the neutral and his employees even though the extension did nothing to facilitate the appeal to the primary employees. In the instant case and others like it, persuasive evidence of the unnecessary extension was furnished by the circumstance that there was a separate gate on the premises used exclusively by the neutral employers and their employees, and the union had extended its picketing and related activity to that gate.[29]

---

[28] *Retail Fruit & Vegetable Clerks Union, Local 1017* v. *National Labor Relations Board*, 249 F. 2d 591 (C.A. 9).

[29] In addition to the instant case, see, *e.g.*, *Local No. 36, International Chemical Workers* (*Virginia-Carolina Chemical Corp.*), 126 NLRB No. 117; *United Steelworkers of America* (*Phelps Dodge Refining Corp.*), 126 NLRB No. 168. See, also, *Atomic Projects & Production Workers* (*New Mexico Building Branch, Associated General Contractors*), 120 NLRB 400, 403 *ff* (1958), enforced, *sub nom. Office Employees International Union* v. *National Labor Relations Board*, 262 F. 2d 931 (C.A.D.C.).

Other evidence, of course, may point to the same conclusion. Thus, in *Union de Trabajadores (Gonzales Chemical Industries, Inc.)*, 128 NLRB No. 116, August 26, 1960, a contractor, Lummus, was employed by a manufacturer, Gonzales, to perform construction work at Gonzales' premises that was expected to take more than six months. Lummus, who had no regular place of business in Puerto Rico, where Gonzales' plant was located, employed approximately 90 people for this work; they reported for work at times different from Gonzales' employees and wore helmets which were different in color. During the course of a primary strike and picketing against Gonzales, the union used signs which did not identify Gonzales as the target of its dispute; the pickets, in addition, orally induced employees of Lummus to refuse to work. Although the employees of Gonzales and Lummus used a single entrance, the Board found a violation of Section 8(b)(4)(A) because of the evidence of activity calculated to unnecessarily enmesh Lummus in the dispute. The Board stated (slip op. pp. 3–4):

> The Act reflects the "dual congressional objectives of preserving the right to labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own" [quoting from *Denver*, p. 14, *supra*]. By its *Moore-Drydock* decision, the Board has sought to accommodate these dual statutory objectives in a reasonable and practicable manner in com-

mon situs cases. While the *Moore Drydock* case itself was one in which the picketing occurred at the premises of a secondary employer, the rule evolved has been applied by the Board in cases where the picketing was conducted at the situs of the primary employer's operations at which the neutral employer also was engaged [citing *Crystal Palace* and *PBM, supra*]. No persuasive reason was apparent to the Board in those cases for permitting the legality of picketing to depend on where the title to the property was vested, and we do not now see any logical reason for holding otherwise. Indeed, upon reconsideration of this matter, we are again convinced that the protection of the Act's so-called secondary boycott provisions should be as available to the secondary or neutral employer in the position of Lummus who is engaged in work for a relatively extended period of time at the premises of another as to the neutral employer confined to a permanent business site who finds himself in the middle of a labor dispute involving another employer. Application of the secondary boycott provisions to cases involving neutral employers in both the aforementioned situations would obviously effectuate the Act's purpose of "shielding unoffending employers from pressures in controversies not their own." At the same time, without unnecessarily enmeshing neutral employers in the disputes of others, the union is left free under *Moore-Drydock* criteria effectively to exert its pressures on the employer with whom it is in dispute * * *.

In sum, it is the Board's view that, when union ivity occurs at, or in connection with, premises ich the primary employer alone occupies, the right the union to engage in primary activity may be en unlimited effect. Hence, all union attempts, by keting and allied means, to cut off deliveries, pick-s, and employment at the primary employer's plant l be regarded as primary and outside the purview Section 8(b)(4)(A). Similarly, where union ac-ity occurs at premises occupied solely by a neutral ployer, the right of the neutral to be free of pres-re in disputes not his own may be given unlimited ect. Hence, any union activity there, designed to luce the neutral's employees not to handle or work the primary employer's products, will be regarded secondary and within Section 8(b)(4)(A). here, however, the primary employer and the neu-l employer are at work on the same premises—espective of the ownership of those premises and espective of whether the neutral employer is per-ming work directly for, or merely in conjunction h, the primary employer—the practicalities may be h that neither the right of the union nor of the tral may be given unlimited scope. The union, these circumstances, may engage in picketing and ed activity at the common premises so long as it dertakes to confine its picketing, so far as possible, he primary employer's operation.

C. *The Board's approach, as applied to the facts of this case, achieves a reasonable accommodation as between the right of the union to picket the primary employer and the right of the neutral employer to remain uninvolved in the dispute*

As noted in the Statement, *supra*, General Electric's Appliance Park plant consists of 13 buildings located on about 1,000 acres of land. Vehicles can enter and leave the premises by 5 roadways across culverts, which are called "gates." At the time of the strike, in June 1958, the company employed about 10,500 employees, including about 7,600 production and maintenance employees represented by petitioner.

In addition, the company had contracts with 12 independent contractors for maintenance and alteration work, 6 of whom had actually started on various major projects. One contractor, R. J. Heffernan Company, had been at Appliance Park "approximately 5 to 6 years, practically regular," employing a work force that varied from 1 to 50 men. When the strike began, some of its employees had been at the plant continuously for a year or more. Three other contractors had worked at the plant for a period of 2 to 2½ years. The contractors' employees reported to the plant daily and worked there all day long. They had also been assigned lockers, tool boxes and parking spaces on a permanent basis.

In these circumstances, Appliance Park was a regular work place for contractors' employees, no less than for General Electric's employees. If a picket line were established at the premises, they would have to cross it every day. From their standpoint, the

icket line at the General Electric premises was much
ie same as though the union had picketed premises
here they alone worked. Contrary to petitioner
Br. 98–99), the picketing could therefore be ex-
ected to have far greater impact on the contractors'
nployees than it would on a deliveryman driving
p to the plant to make a pick-up or delivery, or a
rviceman appearing briefly to make a repair. Per-
ons having only a fleeting or occasional contact with
ie plant would not be likely to view the picketing
s aimed at their employers. On the other hand,
iere is good reason to apprehend that continued
icketing occurring at the place where neutral em-
loyees regularly go to and from work, focused upon
iose employees, might cause substantial damage to
ie business of third persons (the independent con-
ractors) not themselves concerned in the dispute.
Ve submit that Section 8(b)(4)(A) embraces a pur-
ose to relieve the contractors, as neutrals, of this
ype of pressure.[30]

To be sure, since the picketing occurred at General
Electric's premises, an accommodation has to be made
or the union's right to picket the company. Our
oint is that the substantial interests of the neutral
ontractors can be protected, without serious im-
airment of the union's right to engage in primary
ctivity against General Electric. Thus, requiring

[30] As Senator Taft stated, Section 8(b)(4)(A) was intended
protect "the business of a third person who is wholly un-
ncerned in the disagreement between an employer and his
nployees" (93 Cong. Rec. 4198, Leg. Hist. of the L.M.R.A.,
47, p. 1106).

the union to confine its picketing, so far as practicable, to General Electric and to take no action which would suggest that the dispute extended to the contractors, permits the union to continue to picket at the four other gates to the premises. By this picketing, it could carry an appeal to support the union in its dispute with the company, reaching not only the non-striking General Electric employees but also others, including deliverymen and even the contractors' employees (who would not be oblivious to the fact that the premises were being picketed).

The situation here is substantially similar to that in *Denver* and *Electrical Workers,* pp. 17–18, *supra.* There, as here, the same premises were the regular work site for a number of different employers and their employees. In these circumstances, this Court concluded, neither the right of the union to engage in primary activity nor the right of the neutral employers to remain free of pressure could be absolute. The union could picket the contractor with whom it had a dispute at the common work site, provided it made every effort to confine its activity to that contractor; but, if it focused some of its efforts upon implicating other contractors in the dispute, to that extent it violated Section 8(b)(4)(A).

Denver and *Electrical Workers* cannot be distinguished on the ground that the relationship between contractors on a building and construction project is materially different from that between General Electric and its contractors at Appliance Park. Petitioner says (Br. 57–58; see, also, *Amici* Br. 23) that

in the building and construction situation the various contractors on the project are not doing work for each other but for some third person, whereas here the contractors are doing work directly for the primary employer, General Electric. But, considering the interdependence of the various crafts on the typical construction project, it is highly unrealistic to say that the work of one does not benefit or involve the others. For example, the electrical subcontractor may not be able to wire the building unless the carpenter subcontractor puts in studs; if the union has a dispute with the former and, in furtherance of its cause, strikes the latter, there has been an interruption of work which directly involves the primary employer to the same extent as here. The difference is that here the disruption has occurred on premises owned by the primary employer whereas in the example given the premises are owned by a third party—a distinction which the union concedes is not material (Br. 91–92). Indeed, as the *PBM* case, discussed *supra,* p. 26, illustrates, where the primary dispute is with the general contractor who owns the land, and the union strikes his subcontractors, a situation identical to that presented here may arise in the building and construction situation.[21] In other words,

[21] Petitioner concedes (Br. 62), that, if the union had a dispute with one of the contractors instead of General Electric, the latter could properly have restricted the picketing at its premises to a separate gate, for the company's employees "perform no service for the contractor." This distinction seems particularly artificial in this case, where, as petitioner notes (Br. 75), the contractors' employees were performing work within the General Electric plant. In this situation, a work

the principle of the *Denver* case applies to injuries suffered by subcontractors in consequence of a strike against the general contractor no less than to the situation where the subcontractor is the primary employer and the general contractor the unoffending secondary employer.

Moreover, the propriety of union action in a "common-situs" situation does not turn on whether the neutral employees are merely being asked to discontinue work or services which they are doing for the primary employer at that location, or all work or services (Pet. Br. 48–49). Petitioner's classification of cases (Br. 50–61) overlooks those in which violations of Section 8(b)(4)(A) have been sustained in circumstances where the primary employees were present on the premises with the neutral employees, and direct efforts were made only to induce the latter not to assist the primary employer, as by loading or unloading his truck, using materials which he had delivered, etc.[35] Violations have been found in

---

stoppage by the company's employees could impede the tasks of the contractors' employees, no less than the instant strike of the company's employees could affect the work of the contractors' employees. In short, in both cases, interruption of the work of the neutral employees would, "of itself, exert * * * direct economic pressure on the primary employer" (Br. 49). Accordingly, if a distinction is to be drawn between the two cases, as petitioner contends, it can only be on the concededly irrelevant ground that here the primary employer owns the premises where the picketing occurs, whereas in the hypothetical case he does not.

[35] See *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, 96–97 (the refusals to handle American Iron freight); *National Labor Relations Board* v. *Local 135*,

this situation (upon evidence showing that the union was directing its pressure at the neutral employers rather than merely seeking to enlist their employees as an incident of picketing the primary employer) because Section 8(b)(4)(A) bans partial no less than total refusals to work (cf. Pet. Br. 41, n. 19).

Congress, in enacting Section 8(b)(4)(A), deliberately rejected such common law tests as "unity of interest" and "community of interest," which would have deprived an employer of his neutral status if he handled the primary employer's products or furnished services to him.[33] Instead, it enacted a ban against all strike

---

Teamsters, 267 F. 2d 870 (C.A. 7), certiorari denied, 361 U.S. 914; *Truck Drivers, Local 728 (Genuine Parts)* v. *National Labor Relations Board*, 265 F. 2d 439 (C.A. 5), certiorari denied, 361 U.S. 917; *Printing Specialties and Paper Converters Union, Local 388* v. *Le Baron*, 171 F. 2d 331, 333 (C.A. 9) (although the truck was that of an independent trucker, the trucker was hired by the primary employer to circumvent the picket line at his plant and thus was "allied" with him, 82 NLRB at 278); *National Labor Relations Board* v. *Brewery and Beer Distributor Drivers, Local 830*, 281 F. 2d 319 (C.A. 3); *Brewery and Beverage Drivers, Local 67* v. *National Labor Relations Board*, 220 F. 2d 380 (C.A.D.C.), enforcing 107 NLRB 299; *Truck Drivers, Local 728 (Campbell Coal Co.)* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A.D.C.), certiorari denied, 355 U.S. 958; *National Labor Relations Board* v. *United Steelworkers of America, Local 5246*, 250 F. 2d 184 (C.A. 1); *National Labor Relations Board* v. *International Hod Carriers, Local 1140* (C.A. 8), No. 16,538, decided December 22, 1960, 47 LRRM 2345. See, also, *Amalgamated Meat Cutters, Local 88* v. *National Labor Relations Board*, 237 F. 2d 20 (C.A.D.C.), certiorari denied, 352 U.S. 1015 (refusal of secondary employees to buy meat from primary employer's salesmen).

[33] See *National Labor Relations Board* v. *Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584, 587 (C.A. 2); *Printing Spe-*

action directed against employers who were independent of the primary employer and could not affect the underlying dispute except by discontinuing normal business relations with the primary employer.[34] The

---

cialties & Paper Converters Union, Local 388 v. *LeBaron*, 171 F. 2d 331, 334 (C.A. 9); 93 Cong. Rec. 4197–4198, Leg. Hist. of the L.M.R.A., 1947, pp. 1104–1106. Cf. *Metal Polishers (Climax Machinery Co.)*, 86 NLRB 1243, 1251–1252 (1949).

Petitioner's attempt (Br. 25–29, 40–41, 49) to distinguish the typical secondary boycott situation (*i.e.*, where B, who sells or processes A's products, is struck in order to force a discontinuation of business relations with A) from the situation here (*i.e.*, where B's employees, who perform services for A in the presence of A's employees, are induced to stop that work) is not persuasive. It is difficult to perceive how the economic pressure exerted on A in the former case is any different than it is in the latter (Br. 49). Of even more importance, the plight of B is the same in both cases. He is unable to grant the union's ultimate demands (which relate to the conditions of employment of A's employees); the only thing he can do in that connection is to exert pressure on A to grant those demands, by ceasing to do business with him until he gives in. Stated otherwise, the only justification in both cases for extending the union's dispute to B is that B and A derive benefits from doing business with each other—a justification which Congress concluded was not sufficient.

[34] As Senator Taft pointed out (93 Cong. Rec. 4198, Leg. Hist. of the L.M.R.A., 1947, p. 1106):

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

Although the Board has rejected common law tests in drawing the line between primary and secondary activity, it has, of course, recognized that there are certain situations where the

contractors here fall in this category. They were independent of General Electric; the work which they were performing was not work which General Electric itself would have performed but for the strike; and they were unable to influence the outcome of the union's dispute with General Electric except by discontinuing business relations with General Electric.

At bottom, the union's contention that its action against the contractors was privileged because they were doing work directly for the primary employer, General Electric, is but a variant of the argument that was rejected in *Denver* and *Electrical Workers, viz.*, Section 8(b)(4)(A) was only applicable to the situation where the union had extended its activity from the job which gave rise to the dispute "to another front" (341 U.S. at 693, dissenting opinion). As Judge Learned Hand, whose opinion in *Electrical Workers* was affirmed by this Court, stated with reference to this contention (181 F. 2d at 37):

---

relationship between the secondary employer and the primary employer is so close that the former is not in fact a neutral "wholly unconcerned" in the primary dispute. For example, where the secondary employer has allied himself with the primary employer by knowingly doing work which the latter would have done but for the dispute (see *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y.); *National Labor Relations Board* v. *Business Machine Mechanics Conference Board*, 228 F. 2d 553, 557–559 (C.A. 2), certiorari denied, 351 U.S. 962), or where the secondary employer is owned and controlled by the primary employer and is thus not truly independent of him (see *J. G. Roy & Sons Co.* v. *National Labor Relations Board*, 251 F. 2d 771, 773–774 (C.A. 1); *Milwaukee Plywood Co.* v. *National Labor Relations Board* (C.A. 7), December 20, 1960, 47 LRRM 2291, 2292).

> The situation was therefore within § 8(b)(4)(A), unless it makes a difference that Giorgi, upon whom the "concerted refusal" indirectly impinged, was at work on the same job with Langer with whom the union had its dispute. In short, is a secondary boycott limited to pressure upon third parties who are not engaged in the same venture with the unyielding employer? We can see no basis for such a distinction. The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands. We cannot see why it should make any difference that the third person is engaged in a common venture with the employer, or whether he is dealing with him independently. The phrase, "doing business," would ordinarily cover doing any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with him to perform part of a work which the third party has himself contracted to do. The third party cooperates as truly with one to whom he furnishes materials as with a subcontractor. * * *

See, also, this Court's opinion in *Denver,* 341 U.S. at 689–690.

D. *Petitioner's contentions do not impair the validity of the Board's conclusion in this case*

1. Contrary to petitioner's view (Br. 70–75), the Board's decision here is not inconsistent with *Na-*

tional Labor Relations Board v. *International Rice Milling Co.*, 341 U.S. 665. In that case, the Court held that Section 8(b)(4)(A) did not proscribe picketing and picketers' appeals, at the primary employer's plant, which induced a customer's truck, driven by two employees, to drive away without picking up supplies for their employer. The Court concluded that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike," and that the conduct which occurred—*i.e.*, the inducement of "individual employees of neutral employers only as they *happen to approach* the picketed place of business"—was a characteristic incident of a primary strike (341 U.S. at 672, 673; emphasis added).[35] The Board has consistently followed this ruling and recognized as legitimate primary activity all efforts to secure observance by neutral employees of a picket line placed at premises solely owned and occupied by the primary employer.

The situation in the instant case is significantly different from that in *Rice Milling;* here, the primary employer's premises were not only his work place,

[35] In *Rice Milling*, the Court expressed this conclusion in these terms: "[T]he applicable proscriptions of § 8(b)(4) are expressly limited to the inducement or encouragement of *concerted* conduct by the employees of the neutral employer. That language contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill" (341 U.S. at 670–671). However, in the companion *Denver* case, it described the conduct in *Rice Milling* as "no more than *was traditional and permissible in a primary strike*" (341 U.S. at 687, emphasis added).

but also the regular work place of several neutral employers. Accordingly, it was appropriate to treat the General Electric premises, not solely as a work site for the primary employer, as in *Rice Milling*, but as a common work site, and to make an accommodation for the rights of the neutrals at work there, as in *Denver* and *Electrical workers*.

To be sure, *Rice Milling* holds that Section 8(b)(4)(A) must be read as preserving the right of the union to do what is "traditional" in a primary strike. But the instant case does not present a traditional or a typical problem. Moreover, one could hardly read into *Rice Milling* a view that accommodation is not to be made in common-situs cases between a union's right to engage in primary activity and the rights of neutral employers. The *Denver* and *Electrical Workers* cases were decided on the same day as *Rice Milling*.[34]

2. Petitioner's position is not aided by the concluding proviso to Section 8(b)(4):

> *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the

[34] Nor can the citation of *Ryan* (p. 22, *supra*) in *Rice Milling* (341 U.S. at 672, n. 6) be regarded as a holding that the separate gate picketing here is necessarily an attribute of legitimate primary activity. There was no attempt by the Court to examine the facts of *Ryan*. It was merely cited, along with several other cases, in support of the general proposition—which is stated, in somewhat different terms, in the Board's opinion in *Ryan*—that Section 8(b)(4) was not intended to "interfere with the ordinary strike." See *Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market)*, 116 NLRB 856, 859–860 (1956).

> premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: * * *

It is suggested (Br. 38) that, in this proviso, "Congress demonstrated that it understood that preservation of traditional strike pressure meant that a striking union would remain free to induce employees of neutral employers to refuse to perform services 'upon the premises' of the struck employer." Although neither the Board nor the courts have had occasion to delineate the precise scope of this proviso,[11] it is clear that it does not define what constitutes primary activity; at most, it undertakes to protect, under certain circumstances, the refusal of neutral employees to cross a picket line which has otherwise been found to be primary. If the proviso were read as privileging every picket line at the premises of an employer whose employee representative had called a strike, it would have the effect of removing from the ban of Section 8(b)(4)(A) picketing in the familiar common situs situations where there had been no effort to confine the picketing to the primary employer in accordance with the *Moore-*

[11] But see the report of the Trial Examiner in *Interborough News Co.*, 90 NLRB 2135, 2146–2149 (1950).

Dry Dock criteria [38]—a result which petitioner does not urge.

Nor can guidance be derived from the 1959 amendments to the Act (see Pet. Br. 46, 72–73; *Amici* Br. 29–36) in determining whether the picketing involved here is to be deemed primary or secondary. In that year, Congress amended Section 8(b)(4)(A) (renumbering it 8(b)(4)(B)) to cover the inducement, not only of employees, but of "any individual employed by any person engaged in commerce." It also deleted the requirement that a "concerted" work stoppage be induced, and added the following proviso (Pet. Br. 4):

> *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

Petitioner contends that this proviso, particularly in the light of its legislative history, shows that, at least under the 1959 amendments (which govern the validity of the Board's order here because it looks to the future), Congress made clear that it did not intend to outlaw picketing at primary premises.

The phrase "primary strike or primary picketing" in the new proviso does not help in resolving the issue in this case. There is no disagreement that Congress intended in the original Section 8(b)(4)(A) to outlaw "secondary boycotts," and not "primary strikes" (pp. 13–14, *supra*). The new proviso does

---

[38] For example, in *Crystal Palace* (pp. 26–28, *supra*), the picket line was found to be secondary, though it was at the premises of an employer whose employees were on strike. See, also, pp. 22–26, *supra*.

not define what is "primary," but merely sets forth n the statute the principle which has governed the lecisions of the Board and the courts since Section 3(b)(4)(A) was first inserted in the Act in 1947. Thus, the picketing at gate 3-A would be protected nder the new proviso only if it were primary under he principles developed under the original Section 3(b)(4)(A).

This interpretation of the new proviso is con-rmed, not weakened, by the legislative history. The hanges in the opening part of Section 8(b)(4)—xtending it to "any individual" and eliminating concerted"—were designed to close certain loopholes n the original provision. It had been held that the rovision did not apply to the inducement of indi-iduals not included in the statutory definition of em-loyee, such as railroad employees, nor to the situa-ion where the work stoppage involved only a single mployee rather than a group of employees.[39] The hanges in language were made to bring these cases ithin Section 8(b)(4). However, because this ourt in *Rice Milling* had relied on the term "con-erted" in finding that the picketing there was not anned by the section (n. 35, *supra*), it was feared hat the elimination of that term from the amended rovision might be construed as reversing the *Rice illing* decision and invalidating the type of picket-g involved there. The proviso was inserted to in-ire that the deletion of "concerted" would not be viewed. Thus, the Conference Report (I *Leg.*

[39] See Aaron, *The Labor-Management Reporting and Dis-sure Act of 1959*, 73 Harv. L. Rev. 1086, 1113 (1960).

History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959), p. 942, H.R. Rep. No. 1147, 86th Cong., 1st Sess., 38) states:

> The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the *limitations* on picketing at the site of a primary labor dispute that are in existing law. See, for example, *NLRB* v. *Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); *Brotherhood of Painters, Decorators and Paperhangers, etc., and Pittsburgh Plate Glass Co.* (110 NLRB 455 (1954)); *Moore Drydock Co.* (81 NLRM 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 (1953)).[40] [Emphasis added.]

The cases cited involve common work situations, two of them (*Denver* and *Washington Coca Cola*) instances where the object of the picketing was found to be secondary.

3. Petitioner relies heavily (Br. 83–86) upon two courts of appeals' decisions, *Local 618, Automotive Employees Union (Incorporated Oil Co.)* v. *National Labor Relations Board,* 249 F. 2d 332 (C.A. 8) and *Seafarers International Union (Salt Dome Production Co.)* v. *National Labor Relations Board,* 265 F. 2d 585 (C.A.D.C.). Both are distinguishable on their facts and illustrate the proposition that the problem is

[40] The citation of *Moore Dry Dock* is erroneous and should read 92 NLRB 547; the citation of *Washington Coca Cola* should read 107 NLRB 299.

not one which can be met by generalities but, rather, one which requires, in each instance, a particularized determination.

In *Incorporated Oil,* as here, the union picketed the primary employer's premises at a time when the employees of secondary employers were at work there. However, unlike this case, the only circumstance suggesting a calculated endeavor by the union to enmesh the secondary employer in the dispute was the fact that it continued to picket even after the primary employees had temporarily been removed from the premises. On the basis of this fact alone, the Board concluded that lawful primary picketing had been converted into illegal secondary activity and banned all picketing at the primary premises. The Eighth Circuit held, however, that this conclusion was not warranted—that, in the circumstances shown, the temporary removal of the primary employees was not sufficient to destroy the primary character of the picketing. This view plainly would not preclude a contrary conclusion on the different facts here, which show that the union, although afforded an adequate opportunity to engage in primary picketing at other gates on the premises, deliberately extended its picketing and other activities to a gate used only by neutral employees. See *National Labor Relations Board* v. *International Hod Carriers, Local 1140* (C.A. 8), No. 16,538, decided December 22, 1960, 47 LRRM 2345, 2348, explaining the limited scope of the court's earlier ruling in *Incorporated Oil.*

Similarly, *Salt Dome* was a case in which the onl evidence of secondary object was the fact that th picketing, which occurred at the dock where the pri mary employer's ship was undergoing repair, con tinued after the primary employer had removed hi employees from the ship. The court of appeals con cluded that this fact was not sufficient to override th other evidence in the record which revealed a carefu effort to confine the picketing to the primary em ployer. As the court explained, in distinguishin *Salt Dome* in its opinion in this case (R. 198–199):

> There, however, the pickets (1) identified them selves specifically as striking only their primar employer, (2) proclaimed by signs clearly show ing that they had no dispute with the secondar employer, (3) distributed leaflets which ex plained in detail not only their own purpos and the reason picketing was conducted at th particular location, but especially excluded th secondary employer and its employees. More over, the primary employer had placed its shi in the secondary employer's yards and onl thereafter were its employees withdrawn; th ship had no other berth at which the union' organizational efforts might be publicized; an the vessel normally was at sea, months on end with its crew shifts rotated and transporte back and forth by helicopter. The operation as conducted by the primary employer not onl had precluded the possibility of picketing th ship directly, but as evidence of the employer'

[41] Two members of the panel which decided this case (Judge Danaher and Prettyman) were also on the panel which de cided *Salt Dome*.

> purpose, the primary employer during the night placed a crew aboard the vessel and towed it away. Such circumstances and such conduct, we concluded, made it clear that the union intended—not to shut down the neutral's operations, but to conduct lawful strike activities against the primary employer. * * *

4. Finally, we submit that the Board's accommodation between the conflicting interests in the situation presented here is not impaired by the circumstance that a distinction is drawn between the types of secondary employers who do business with the primary employer. Petitioner asserts that it is anomalous to permit the union to take direct steps to induce the deliveryman not to cross a picket line at the primary employer's plant, but require it to be more circumspect in relation to the employees of contractors working on the primary premises in a regular manner (see Pet. Br. 98–99; *Amici* Br. 24–25). There is, however, a persuasive reason for drawing that line—as pointed out above, picketing focused upon neutral employees who work steadily at the site of the dispute is fraught with far more serious and damaging consequences for neutral employers.

Nor is the distinction drawn by the Board invalidated by the fact that in particular cases it may be difficult to determine in which category a particular neutral employer falls (see Pet. Br. 99). As this Court has observed (*10 East 40th St. Co.* v. *Callus*, 325 U.S. 578, 584):

> * * * when lines have to be drawn they are bound to appear arbitrary when judged solely

by bordering cases. * * * Lines are not wor
for being narrow if they are drawn on ration
considerations. * * *"

In sum, here, as in *Denver*, the Board's decisi
should be sustained on the ground that it represen
a reasonable accommodation of "the dual congre
sional objectives of preserving the right of labo
organizations to bring pressure to bear on offendi
employers in primary labor disputes and of shieldi
unoffending employers and others from pressures i
controversies not their own" (341 U.S. 675, 692). Th
determination as to how, in particular circumstance
these objectives may be reasonably accommodated
one which cannot be derived by deduction from th
statute. It calls for expert administrative judgmen
Cf. *Republic Aviation Corp.* v. *National Labor Rel*
tions Board, 324 U.S. 793; *Brooks* v. *National Labo*
Relations Board, 348 U.S. 96; *National Labor Rel*
tions Board v. *Truck Drivers Local Union No. 44*
353 U.S. 87. Since the Board's conclusion reflec

---

[42] There is no warrant for the fears (*Amici* Br. 24–25, 20–2
that the Board's decision in this case would result in maki
every industrial plant a "common situs" and permit an ea
means of "strike-breaking." The mere fact that a neutral em
ployee comes to the plant to perform work is not sufficient
bring into play the rule of this case; it must be established fu
ther that the neutral employer is at the plant for such a lo
and continuous period that it has in effect become a regul
work place for his employees. Moreover, if a struck prima
employer were to bring in a "neutral" employer merely for th
purpose of doing work which his own employees would ha
done but for the strike, it would appear that the union's full pre
sure could be exerted against the "neutral" under the "ally
doctrine (see n. 34, *supra*).

"administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the * * * facts," it represents "an allowable judgment which [the courts] cannot disturb." *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 209.

CONCLUSION

The judgment of the court of appeals enforcing the Board's order should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MELVIN J. WELLES,
Attorney,
National Labor Relations Board.

FEBRUARY 1961.

APPENDIX

A. The relevant provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. 151, *et seq.*), read as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person; * * * *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

B. The relevant amendments to the National Labor Relations Act made by the Labor-Management Re-

porting and Disclosure Act of 1959 (73 Stat. 519, 542, 29 U.S.C. 158, Supp. I, are as follows:

SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *. *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act * * *.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1961

ILE COPY

FILED
FEB 28 1961
JAMES R. BROWNING, Clerk

No. 321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

and

GENERAL ELECTRIC COMPANY

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

---

BRIEF FOR RESPONDENT GENERAL ELECTRIC COMPANY

GERARD D. REILLY
LAWRENCE T. ZIMMERMAN
1120 Tower Building
Washington 5, D. C.

THOMAS F. HILBERT, JR.
570 Lexington Avenue
New York 22, New York

Attorneys for General Electric Company

REILLY AND WELLS
1120 Tower Building
Washington 5, D. C.
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
STATEMENT OF THE CASE	1
A. The Facts	1
B. The Board's Decision	6
C. Decision of the Court Below	7
STATUTES INVOLVED	8
SUMMARY OF ARGUMENT	10
ARGUMENT	18
I. When a Union Induces Employees of Independent Contractors Whose Wages and Conditons of Employment Are Not in Dispute to Engage in a Concerted Refusal to Perform Services for the Admitted Object of Causing Their Employers to Cease Doing Business With Another Company, It Is Violating Section 8(b)(4)(A) of the Act, Irrespective of Whether It Is Engaged in a Primary Strike Against Such Company	18
A. The Language of the Act Creates No Exemption	20
1. The right to picket is no broader than the right to strike	20
2. Section 8(b)(4) proscribes inducement of a partial as well as a total refusal to perform services	24
3. The proviso to Section 8(b)(4) provides no defense for Petitioner's conduct	25
B. The Legislative History of the Act Discloses No Intent to Authorize Striking Unions to Instigate Concerted Stoppages by Employees of Neutral Companies	26
1. Resort to legislative history is justified only where statutory language is ambiguous or would produce an absurd result. This is not the case here	26

Page

2. The contention that the Act was intended to prevent only what Petitioner characterizes as "secondary boycotts" is based on a distorted treatment of Congressional debates .. 28

(a) The understanding of the term by Congress 28

(b) The revision of Section 8(b)(4) in committee 31

3. The earlier Board approach cannot be regarded as sound precedent as it also reflects a highly inaccurate assumption of Congressional purpose 32

(a) A fragmentary reading of legislative history caused the Board to err in its earlier interpretation of the section .. 32

(b) Contrary to the Board's earlier premise, a strike which commands rank and file support need not involve neutrals in order to be effective 35

4. By disregarding the theory of primary situs advanced by the Board in *Rice Milling*, this Court rejected the proposition urged here by Petitioner 36

(a) Contrary to Petitioner's contention the *Rice Milling* decision rested solely on the absence of appeal to concerted activity 36

(b) Petitioner's interpretation of *Rice Milling* is contrary to Congressional understanding 40

(c) The footnote reference to the *Ryan* case is obviously not an adoption of the *Ryan* doctrine 44

II. The 1959 Amendments to the Act, If Anything Reject the Broad Notion of Situs Immunity Advanced by Petitioner 46

Page

A. Viewed in the Light Most Favorable to Petitioner, the Amendments Merely Beg the Question of What Constitutes Legitimate Primary Activity 46

B. Proper Analysis of the Conference Report, However, Reveals That It Recognizes Sharp Restrictions Upon Situs Picketing as Declaratory of Existing Law 47

C. In Any Event, the *Moore Drydock* Limitations Prohibit Picketing at the Reserved Gate 50

1. The picketing falls far short of *Moore Drydock's* minimal safeguards 51

2. The union's attempted distinction between manufacturing cases and other common situs cases is baseless 53

CONCLUSION 57

APPENDIX 58

AUTHORITIES CITED

CASES:

Atomic Projects and Production Workers, 120 NLRB 400, enf'd *sub nom. Office Employees International Union* v. *N.L.R.B.*, 262 F. 2d 931 (CADC) 55

Brotherhood of Painters, Decorators, and Paper Hangers, etc. and *Pittsburgh Plate Glass Co.*, 110 NLRB 455 (1954) 17, 48

Crystal Palace Market, 116 NLRB 856 ..13, 18, 45, 48, 54

Di Giorgio Fruit Corp. v. *N.L.R.B.*, 191 F. 2d 642, cert. den. 342 U.S. 869 15

Douds v. *International Longshoremen's Association*, 224 F. 2d 455 (CA 2), cert. den. 350 U.S. 873 27

Douds v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y.) 27

Holy Trinity Chruch v. *United States*, 143 U.S. 457 27

Inferborough News Co., 90 NLRB 2135 13

International Brotherhood of Electrical Workers v. *N.L.R.B.*, 341 U.S. 694 35

Page

International Brotherhood of Teamsters v. *New York, N.H. & H.R.R.*, 350 U.S. 155 19
International Rice Milling Company, Inc., 84 NLRB 360 38
International Rice Milling Company, Inc. v. *N.L.R.B.*, 183 F. 2d 21 (CA 5) 19, 38, 39
Local 618, Automotive, Petroleum, and Allied Industries Employees v. *N.L.R.B.*, 249 F. 2d 332 (CA 8) 23
Moore Drydock, 92 NLRB 547 ..... 6, 17, 48, 50-52, 53, 54
N.L.R.B. v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951) 17, 35, 39, 48
N.L.R.B. v. *Drivers, Chauffeurs, Helpers Local Union No. 639 (Curtis Bros.)* 362 U.S. 274 ..... 12, 20, 21
N.L.R.B. v. *International Rice Milling Co.*, 341 U.S. 665 ..... 14, 35, 36, 37, 39, 40, 42, 44, 45
N.L.R.B. v. *Local 313, International Brotherhood of Electrical Workers*, 254 F. 2d 221 (CA 3) 19
N.L.R.B. v. *Rockaway News Co.*, 345 U.S. 71 25
N.L.R.B. v. *United Steelworkers*, 250 F 2d 184 (CA 1) 23
Pure Oil Co., 84 NLRB 315 ..... 13, 15, 32, 33, 48
Rabouin d/b/a Conway's Express v. *N.L.R.B.*, 195 F. 2d 906 (CA 2) 19
Retail Fruit & Vegetable Clerks v. *N.L.R.B.*, 249 F. 2d 591 (CA 9) 54
Ryan Construction Co., 85 NLRB 417 ..... 13, 14, 15, 18, 32, 34, 44, 48
Schultz Refrigerated Service, Inc., 87 NLRB 502 ..... 13, 48
Seafarers International Union v. *N.L.R.B.*, 265 F. 2d 585 (CADC) 15, 19
United Brick & Clay Workers v. *Deena Artware*, 198 F. 2d 637 (CA 6) cert. denied, 344 U.S. 897 ..... 40, 44
Washington Coca-Cola Bottling Works, Inc., 107 NLRB 299 (1953) 17, 48

STATUTES:

National Labor Relations Act, as amended, 1947 (61 Stat. 136, 29 U.S.C., § 151, et seq.):

Section 2(3) 11, 20
Section 7 ..... 11, 20
Section 8(b) 11, 20, 21
Section 8(b)(1)(A) 21, 28

Page

Section 8(b)(4) 16, 21, 28, 30, 39, 41, 43, 44
Section 8(b)(4)(A) 8, 11, 12, 19, 26, 36, 38, 43, 44
Section 8(b)(4)(B) 38, 39
Section 8(d) 27
Section 9 12
Section 13 ..... 11, 12, 20-22
Section 303 ..... 13, 26, 41
Section 501(2) 9, 21

National Labor Relations Act, as amended, Sept. 14, 1959, Pub. Law 86-257, 73 Stat. 519, 29 U.S.C. § 151, et seq.:

Section 8(b)(4)(B) 9, 42

Legislative Materials:

House Conference Report No. 1147, 86th Cong. 1st Sess., p. 38; I Legislative History of Labor-Management Reporting and Disclosure Act 942 16, 17, 46, 47, 54

House Report No. 1556, Part 2, 86th Cong. 2d Sess. Supplemental Views, p. 20 49-50

Senate Report No. 105 on S. 1126, Supplemental Views, p. 54; I Legislative History of Labor-Management Relations Act 460 30

S. 55, 80th Cong. 1st Sess ..... 25, 26, 31, 33, App.

S. 1126, 80th Cong. 1st Sess., I Legis. Hist. 99, 114 .. 26

93 Daily Cong. Rec. 4138, April 25, 1947; II Legis. Hist. 1020-21 29

93 Cong. Rec. 4255, April 28, 1947; II Legis. Hist. 1056 29

93 Cong. Rec. 4322, 4323, April 29, 1947; II Legis. Hist. 1105-1107 30

105 Daily Cong. Rec. 13091, 13092, July 27, 1959; II Leg. Hist. L.M.R. & D.A. 1522 41

105 Daily Cong. Rec. 15221, August 20, 1959; II Leg. Hist. L.M.R. & D.A. 1707 42-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 321

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

and

GENERAL ELECTRIC COMPANY

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

---

BRIEF FOR RESPONDENT GENERAL ELECTRIC COMPANY

STATEMENT OF THE CASE

A. The Facts

Respondent, General Electric Company (referred to herein as "the Company") was granted leave to intervene by the Court of Appeals on October 8, 1959 in opposition to the petition to review and set aside the order of the National Labor Relations Board challenged in these proceedings.

The administrative proceedings at issue here began with a charge filed with the Board by the Company alleging that Petitioner, during a strike against the Company, had violated Section 8(b)(4)(A) of the Act by picketing an entrance to the Company's plant known as Gate 3-A, which was used exclusively for ingress and egress of the employees of independent building construction and maintenance contractors. This entrance was clearly separated from and removed from entrances used by Company employees. Following issuance of a complaint, a hearing was held before a trial examiner who recommended that the complaint be dismissed. The Board adopted the findings of fact of the trial examiner "only to the extent consistent" with its opinion which found that Petitioner had violated the Act as charged (R. 37).

The following facts as found by the Board and the trial examiner are not in dispute:

The complained of action of Petitioner occurred during a strike called by Petitioner at the Company's manufacturing plant at Appliance Park. This plant comprises some 1000 acres (R. 13). It is located about ten miles from downtown Louisville. About 99% of the persons employed there come to work by automobile. The plant employs 10,500 workers, about 7,600 of whom are in a bargaining unit represented by Petitioner (R. 13). During the strike, which lasted from July 27 to August 10, 1958, manufacturing operations continued, the Company advising employees that the plant was open for business (R. 135). More than 2000 of the employees represented by Petitioner did not respect Petitioner's picket lines and worked during the strike (R. 63). The 3000 General Electric employees outside the bargaining unit also regularly

crossed Petitioner's picket lines during this period (R. 18).

Of approximately 5000 employees who came to work, all used entrances to Appliance Park other than Gate 3-A. This gate, the Board found, was one which "the Company's employees were not permitted to, and did not use . . . during all periods material herein" (R. 40, n. 5). The trial examiner made no express finding on this point, assuming it was not necessary to his recommendation (R. 40).

The Board's decision contains a description of Intervenor's plant at Appliance Park, Louisville, the location of the entrance gates, and the sign at Gate 3-A which restricted the use of this gate to employees of independent contractors and directed the use of other gates by employees of the Company, including all the personnel for whom Petitioner acted as bargaining agent (R. 38-40). It also described the methods used by the Company to enforce this restriction through the use of distinctive windshield stickers, identification cards, and instructions to the plant guards under which they were enabled to identify the contractors and their employees and to direct persons approaching this gate, including General Electric employees, who did not fall into this category, to other entrance facilities (R. 40).

Little need be added to this summary of the restricted use of Gate 3-A, except to point out that the record establishes that the guards had been instructed prior to the strike which began on July 28, 1958, not to clear anyone through Gate 3-A unless they had special clearance, without identifying such persons as members of the staff of contracting companies (R. 168-169). During the strike the guards continued to

carry out their assigned duties at the gates, one of their assigned duties being to prevent General Electric employees from using Gate 3-A (R. 166) and the personnel of the contracting firms from using the other gates (R. 110).

Before Gate 3-A was restricted to the use of contractors and their employees there had been several jurisdictional disputes among the various AFL craft locals to which employees of these independent contractors belonged (R. 66). In some of these jurisdictional disputes the craft unions had set up picket lines which had the effect of keeping out not only craftsmen employed by the contractors but some of the Company's employees as well (R. 66-67).

According to the president of Petitioner union the strike, beginning July 27, 1958, was concerned with 24 unsettled grievances that had arisen under the contract between the Company and Petitioner, which is a local of the International Union of Electrical, Radio and Machine Workers, AFL-CIO. Although this contract had nothing to do with the wages and conditions of employment of the contractor personnel, Petitioner placed pickets at all the gates to Appliance Park, including Gate 3-A (R. 133).

When groups of contractor employees approached Gate 3-A on Monday, July 28, the first working day after the strike had been called, the pickets blocked the entrance (R. 79), waved them away, and shouted "go home" (R. 105). Some of the construction men, pointing to the car stickers showing that they were employed by contractors, asked in vain for permission to go through the gate (R. 85, 109). Three employees of another contracting firm arrived in a truck at Gate 3-A and were told they could not go to work (R. 96-

97). Another mechanic, arriving for the late afternoon shift, was confronted by the pickets at the gate and asked them if they were keeping out construction workers. He was referred to the union hall but returned to the gate and asked if any construction workers had gone in. When they told him that none had entered, he also departed (R. 88). Subsequently passes were issued to certain individuals but only for the limited purpose of going through the gate, picking up their tools, and then leaving the premises (R. 82, 97-98).

Possibly because of the past practice of the construction employees in honoring picket lines few, if any, crossed the line.[1] Thus the picketing at Gate 3-A had the effect of forcing all the independent contractors at the Company's plant to cease operations during the strike (R. 63).

That Petitioner knew of and intended that the picket line at Gate 3-A would have the effect of inducing contractor employees to refuse to work at Appliance Park is plainly established in the evidence. One of the contractors whose crew had not crossed the picket line, being disturbed by the possibility of contract cancellation, arranged with the business agent of the union to which his employees belonged for a conference with the striking union (R. 92). The contractor sought permission for his men to enter the grounds. He was told (R. 93-95) by the recording secretary of the striking union that the contractor should "appreciate that we have a picket line up over there" (R.

[1] The Board found (R. 41) that "most, if not all, of the independent contractors' employees refused to cross the picket line and did not work during the strike."

92). On the following day the contractor, accompanied by the business agent for his employees' union, and the Commissioner of Industrial Relations for the State of Kentucky, approached the striking union to discuss the admittance of contractor employees. They were told by Petitioner's vice president on this occasion that he had no authority to extend such workers privileges to enter the grounds, that he would take it up with his executive board (R. 93-94), and get in touch with the contractor's union representative. Nothing resulted from this conference and the contractor's working force did not return until the pickets were removed (R. 94).

B. The Board's Decision

The Board, reversing the Trial Examiner, held that Petitioner had violated Section 8(b)(4)(A) by causing the employees of independent contractors to engage in concerted refusal to work with an object of forcing the independent contractors to cease doing business with the Company. The Board said (R. 42):

> "We find from the foregoing that only the independent contractors' employees were permitted to use gate 3-A, and that the Respondent was aware of this fact. We find also that the Respondent's object in picketing at gate 3-A was to enmesh these employees of the neutral employers in its dispute with the Company. Such purpose is shown not only by the picketing at gate 3-A but also by the oral appeals to the employees of neutrals not to cross the picket line."

Board Member Fanning, concurring specially, held that under the principles established in *Moore Dry-dock*, 92 NLRB 547, relating to picketing of premises

occupied both by a struck employer and a neutral employer, it appeared that the union had violated the Act. He noted that

> ". . . the picketing at Gate 3-A, which was used exclusively by employees of neutral employers, was not reasonably close to the *situs* of the labor dispute with General Electric and that picketing at this gate did not clearly disclose that the dispute was only with General Electric and had not been extended to the neutral employers of the employees using that Gate."

The order of the Board which the Court of Appeals enforced does not prohibit Petitioner from picketing any entrance to the plant used by employees engaged in a primary strike. All that the order does, in almost the precise language of Section 8(b)(4)(A) of the Act itself, is to direct Petitioner to desist from inducing the employees of certain contractors from engaging in a strike or concerted refusal to perform services where an object is to force or require such contractors to cease doing business with the primary employer, General Electric (R. 43, 202).

C. Decision of the Court Below

In the court below Petitioner in addition to attacking the Board's conclusion of law also argued that the evidence did not support the Board's finding that the object of picketing the contractors' gate was to induce a concerted refusal of the employees of neutrals to perform services for the struck employer, on the ground that the picketing at the contractors' gate was a precautionary move in case some of the non-striking employees of General Electric used that entrance, and that in any event the appeal of the pickets

was to individual workers and not to any concerted action,[2]

The Court, however, sustained the findings of fact of the Board. It phrased the question presented to it as follows (R. 198):

> ". . . was it an object of the strike to induce or encourage the employees of the several contractors—not of the primary employer—to engage in concerted refusal in the course of their employment to perform their own work or to render services so that their employers would cease doing business with General Electric?"

The court having answered this question in the affirmative, held that the Act had been violated, denied the petition for review, and enforced the order.

STATUTES INVOLVED

The National Labor Relations Act, as amended, sometimes referred to herein as the Act, Act of June 23, 1947, c. 120, 61 Stat. 136-162, 29 USC § 151 et seq.; as it appeared prior to its 1959 amendment, contains the following provisions:

> "Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—* * *
> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any

[2] In this Court Petitioner has abandoned these arguments and relies solely on the broad position that since the reserved gate was located on the premises of the struck employer its object in placing pickets there was immaterial.

employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter; * * *

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

"Sec. 501. When used in this Act—* * *

"(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

In 1959, the provisions of Section 8(b)(4)(A) were amended by the Labor-Management Reporting and Disclosure Act (Public Law 86-257, 1959, Section 704 (a), 73 Stat. 541, 29 U.S.C. § 158), and now appear as follows:

"Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—* * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process,

transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—* * * .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

SUMMARY OF ARGUMENT

The only question before the Court is whether the Act, as passed in 1947 or as amended in 1959, permits a striking union to induce employees of neutral employers to engage in a concerted refusal to perform services on property owned by the struck employer for the purpose of forcing their own employers to cease doing business with him. According to Petitioner such conduct is permissible when undertaken in furtherance of a primary strike, so long as the efforts of the striking union are confined to discouraging the employees of the neutrals from working behind any picket line thrown around the property of the struck employer (Pet. Br. 11-12).

1. What Petitioner is saying in effect is that even though the question posed by the Court of Appeals as

determinative of the issue[3] must be answered in the affirmative, the "object" test is not controlling so far as a violation of Section 8(b)(4)(A) of the Act is concerned.

Inasmuch as all that the court did was to paraphrase the language of the subsection, such a contention obviously flies in the face of the statute itself. Petitioner argues, however, that other sections of the Act, particularly Sections 2(3), 7, 13, and the proviso to Section 8(b)(4), together with the legislative history, demonstrate that Section 8(b)(4)(A) does not mean what it says.

It is difficult to understand how the cited portions of the statute (Pet. Br. 11) provide any support for Petitioner's broad position. Section 2(3) merely defines the term "employee" and no one has disputed that the contractors' personnel, as well as the General Electric workers, are employees within the meaning of the Act.

The general language relating to the "right . . . to engage in . . . concerted activities for mutual aid" in Section 7, if standing alone, might give some comfort to Petitioner. It is obvious, however, that this broad language is limited not only by Section 8(b)(4) but indeed all the union unfair labor practices (Section 8(b)(1) to (6) inclusive) since each one defines some specific limitation upon the scope of concerted activity.

---

[3] As the court put it (R. 198):

". . . was it an object of the strike to induce or encourage the employees of the several contractors—not of the primary employer—to engage in concerted refusal in the course of their employment to perform their own work or to render services so that their employers would cease doing business with General Electric?"

Both the language and legislative history of the proviso to Section 8(b)(4) show that this was not intended to confer immunity upon labor organizations to induce concerted refusals by employees of other companies to cross a picket line of a struck employer. It merely protects an individual employee from legal liability.

Certainly the language of Section 13, which provides in substance that nothing in the Act "except as specifically provided for" shall impede or diminish "in any way" the right to strike, has nothing to do with the issue. The holding of the Board and the court below did not rest on the theory of some implied limitation upon striking or picketing but rather upon the ground that Section 8(b)(4)(A) was a specific impediment provided by the Act itself to instigating certain kinds of strikes or partial strikes. Thus the issue is entirely different from the one considered by this Court in *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, where Section 13 was drawn into conflict with the asserted implications of Section 8(b)(1)(A) and Section 9 (relating only to representation cases).

Petitioner's reliance on legislative history, although more extensively argued, is equally misplaced. Ignoring the fact that the draftsmen of Section 8(b)(4)(A) and Section 303 studiously avoided the use of the term "secondary boycott", Petitioner's brief quotes out of context some remarks of Senator Taft in the course of the debate to show that the Act was intended to prohibit only secondary boycotts and jurisdictional strikes. The brief makes no mention of the fact that Senators Ball and Ellender of the Senate labor committee who were also managing the bill on the floor, used the term "secondary boycott" to describe picket lines placed in front of employer establishments in primary strikes for recognition.

Then on the basis of selective excerpts from Senator Taft's statements, Petitioner leaps to the *non sequitur* that when Senator Taft was speaking of "secondary boycotts" he was referring only to product boycotts occurring on the premises of a "secondary" employer. No mention is made in the brief of the fact that the earlier draft of the bill which was the genesis of Section 8(b)(4) and Section 303, prohibited only product boycotts and hence the addition in committee of the words "to cease doing business with any other person" must have been meant to reach such conduct as Petitioner undertook here.

In short, the whole burden of Petitioner's argument would border on the frivolous were it not for the fact that the Board itself at one period of its history accorded Section 8(b)(4)(A) the strained and unwarranted interpretation Petitioner would have this Court place upon it. In a succession of decisions which Petitioner cites in support of its thesis, *Pure Oil Co.*, 84 NLRB 315; *Interborough News Co.*, 90 NLRB 2135; *Schultz Refrigerated Service, Inc.*, 87 NLRB 502, the Board, disregarding the plain meaning of the statutory language, invented a number of situations to which it declared Section 8(b)(4)(A) did not apply, "traditional primary activity"; "situs picketing"; "roving situs", etc.—terms nowhere used in the Act. The Board even went so far in one of these cases, *Ryan Construction Co.*, 85 NLRB 417, where pickets were also placed at a plant entrance not used by the personnel of the struck employer, as to hold such a deliberate incitement to employees of neutrals was beyond the reach of Section 8(b)(4)(A).

The Board overruled the rationale of the *Ryan* case in *Crystal Palace Market*, 116 NLRB 856, enf'd *sub.*

nom. Retail Fruit & Vegetable Clerks v. *N.L.R.B.*, 249 F.2d 591 (C.A. 9)—a decision that Petitioner attempts to distinguish (Pet. Br. 94-95). In its brief Petitioner contends that the holding in the *Ryan* case was approved by this Court in *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, although the facts in the latter case were entirely different. Hence it is said that neither the Board nor the court below correctly applied *Rice Milling* in disposing as they did of the case at bar.

The opinion of this Court in *Rice Milling*, however, did not turn on any broad notion of "primary situs picketing" but upon the fact that since the offending conduct of the striking union was the turning away of a single truck driver by a picket line situated at the entrance to the plant also frequented by the employees of the struck employer, there was no proof of inducement of a "concerted" refusal. In its somewhat lengthy opinion the Court did cite *Ryan Construction* in a footnote but only in support of a noncontroversial dictum.

Petitioner insists that *Rice Milling* cannot be read as holding or implying that the union's conduct there was "permissible only because it was not concerted" (Pet. Br. 15). But the legislative history of the Landrum-Griffin Act shows that both the proponents and opponents of the 1959 amendments to Section 8(b)(4)(a) which eliminated the word "concerted" understood that this was the very ground upon which the *Rice Milling* holding was rested.

We do not contend that a union which places pickets in front of a plant as the source of a primary strike for the purpose of persuading or shaming the nonstriking employees of the struck employer from enter-

ing, violates Section 8(b)(4)(A) *per se* merely because employees of other companies approaching the plant in the course of their normal duties are deterred from crossing the picket line. Such incidents may be so unavoidable and so entangled with the legitimate activities of the pickets that the Board and the courts are justified in finding that evidence of the proscribed objective is lacking and that an inference of intent to enmesh the personnel of neutrals cannot be inferred from the presence of a picket line at the entrances for plant employees. But where it is clear from the location of the pickets or from the character of the inducements to employees of the neutrals that the real object of the union is to reach them and not merely to disrupt the primary employer-employee relationship existing in the company with whom it has a dispute (as Petitioner concedes was its object here), the Board, far from "usurping the function of Congress," is simply carrying out its statutory duty when it holds that such conduct is expressly forbidden by the Act.

Thus there is no sound legal basis for Petitioner's objection to what it terms the "new approach" of the Board. It is true that decisions of the courts of appeals in some circuits lend color to Petitioner's argument, including *Seafarers International Union* v. *N.L.R.B.*, 265 F.2d 585, and *Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 191 F.2d 642, both of which arose in the District of Columbia circuit, which court also passed upon this case.

In these cases, however, and in similar cases in other circuits, the courts, either misled by the fragmentary legislative data which caused the Board to arrive at its *Pure Oil* and *Ryan* decisions, or erroneously interpreting this Court's holding in *Rice Milling* as an

affirmance of such doctrines, failed to perceive that the crucial question in each case was the object of the picketing union. In this case, where the evidence on that point was pinpointed, the very circuit which had originally given the widest latitude to primary situs immunity applied the proper test.

2. There remains the question of whether the 1959 amendments to Section 8(b)(4) detract from the old Act in any relevant respect.[4] Both Petitioner and the amici, despite the omission of the word "concerted," attach importance to the proviso exempting from the proscriptions of the subsection "where not otherwise unlawful, any primary strike or primary picketing." Obviously the qualifying phrase leaves the situation as it was before and the term "primary picketing," not being defined in the statute, merely begs the question. Nothing in the text of the new Act sheds any light as to whether the term "primary picketing" refers, as Petitioner urges, to any picket line situated in the vicinity of property where a primary strike is in progress, or whether the term refers only to picketing directed at the employees of the primary employer.

This question, however, is answered by the authoritative report of the House Conference Managers, for this particular proviso was written in conference and did not appear in either the House or the Senate bills.

The conference report stated that the proviso's purpose was to make clear that

> "the changes in Section 8(b)(4) do not overrule or qualify the present rules of law permitting picket-

[4] As the Board order operates prospectively, it is necessary to consider whether the revised language of the applicable subsection created an immunity which would apply to Petitioner's conduct if repeated again today.

> ing at the site of a primary dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. See, for example, *NLRB* v. *Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); *Brotherhood of Painters, Decorators, and Paper Hangers, etc.*, and *Pittsburgh Plate Glass Co.* (110 NLRB 455 (1954)); *Moore Drydock Co.* (81 NLRB 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 (1953))."

If the *Moore Drydock* case cited, as Petitioner contends, is not the decision appearing in 81 NLRB but rather the case concerning the same company reported in 92 NLRB 547, it would appear that the conferees by endorsing the restrictive principles set forth in that opinion, viz., that the picketing had to be as close as possible to the situs of the dispute, were in effect declaring that existing law prohibited the activity to which Petitioner resorted (see concurring opinion of Member Fanning). The conferees, therefore, apparently deemed the term "primary picketing" to refer to activity at least ostensibly intended to appeal to the personnel of the struck employer. Petitioner's picketing of the reserved gate accordingly does not come within the Congressional concept of "primary picketing," for as it candidly states—

> "The Petitioner has at all times freely admitted that its object in picketing at Gate 3-A was to appeal to employees of the contractors not to serve General Electric, the primary employer, behind the picket line. It has never maintained that its inducement of the contractors' employees by picketing there was merely an unavoidable consequence of picketing directed at and designed to reach GE's employees." (Br. 21)

Moreover, the Board's decision in *Crystal Palace*, overruling the *Ryan* case, was made in 1956 and the Board decision in this case issued more than two months before the conference. Consequently, the inference is inescapable that the conferees regarded these opinions as part of the body of "existing law" the proviso was intended to preserve.

ARGUMENT

I. WHEN A UNION INDUCES EMPLOYEES OF INDEPENDENT CONTRACTORS WHOSE WAGES AND CONDITIONS OF EMPLOYMENT ARE NOT IN DISPUTE TO ENGAGE IN A CONCERTED REFUSAL TO PERFORM SERVICES FOR THE ADMITTED OBJECT OF CAUSING THEIR EMPLOYERS TO CEASE DOING BUSINESS WITH ANOTHER COMPANY, IT IS VIOLATING SECTION 8(b)(4)(A) OF THE ACT, IRRESPECTIVE OF WHETHER IT IS ENGAGED IN A PRIMARY STRIKE AGAINST SUCH COMPANY

The finding of violation of Section 8(b)(4)(A) in this case was not based upon Petitioner's conduct in calling a strike of the General Electric employees it represented or in placing pickets around its plant with a view to persuading the striking employees not to enter. It was based entirely upon the fact that Petitioner not content with placing the pickets at such entrances, also stationed pickets at a gate reserved exclusively for employees and suppliers of some six construction contractors whose employees were engaged in construction and repair work on buildings owned by the struck employer in the general plant enclosure, thereby causing them to engage in a concerted refusal to enter and perform their ordinary services.

Petitioner, as we have seen, candidly admits that its activities at this gate were intended to bring about this result for the deliberate object of forcing the contractors to cease doing any business with the struck employer—at least for the period of the strike. This being the factual situation, the conduct of Petitioner

would seem to be clearly proscribed if the applicable subsection is read literally. *Seafarers International Union* v. *N.L.R.B.*, 265 F.2d 585 at 591. It is Petitioner's contention, however, that certain other provisions of the Act, as well as the legislative history, prove that its activities were not forbidden by the subsection.

Petitioner takes the broad position that when a union is engaged in a lawful primary strike it may by picketing, or by oral or written communication elsewhere (Br. 36), undertake to induce not only the employees of the struck employer but even personnel employed by individual contractors, customers or suppliers to keep away from the premises of the struck employer. Its point is that such conduct amounts to nothing more than "traditional primary activity" to which Section 8(b)(4)(A) was not intended to apply.[5]

---

[5] Petitioner's contention that the proscriptions of Section 8(b)(4)(A) are not meant to be taken literally is at odds with unions' reliance upon a literal reading of the section when such an approach suits their purpose. Thus, they have argued that particular inducements, though secondary in character, are legal because the induced employees are not "employees" within the meaning of the section or that the inducement is not directed toward an "employer" or "person" as defined, e.g., supervisory employees, *Rabouin d/b/a Conway's Express* v. *N.L.R.B.*, 195 F.2d 906 (CA 2); railroads, *International Rice Milling Company* v. *N.L.R.B.*, 183 F.2d 21 (CA 5); *Local* 25, *International Brotherhood of Teamsters* v. *New York, N.H. & H.R.R.*, 350 U.S. 155; county, *N.L.R.B.* v. *Local* 313, *International Brotherhood of Electrical Workers*, 254 F.2d 221 (CA 3). It is interesting to note that had the primary situs doctrine been given the currency now attributed to it by Petitioner, it would have been unnecessary to rely on the purported statutory exclusions, for the conduct complained of would have presumably been protected by its occurrence at a primary situs even if directed at a railroad or municipality.

A. The Language of the Act Creates No Exemption

The provisions of the Act cited by Petitioner as pointing to such a limited construction of Section 8 (b)(4)(A) are Section 2(3), Section 7, Section 13, and the proviso to Section 8(b)(4). Obviously Section 2(3), which merely defines the term "employee," has no relevance and Section 7, relating to the right to engage in concerted activity when read in the context of the whole statute, must mean concerted activity not defined as an unfair labor practice by labor organizations under Sections 8(b)(1)(A) to 8(b)(6), inclusive.

Section 13 and the proviso to Section 8(b)(4) have been adverted to by the Board and the courts in decisions relating to 8(b)(4)(A), however.

1. The right to picket is no broader than the right to strike.

Petitioner's reference to Section 13 would indicate that it places considerable reliance on this section for its basic position. That section reads as follows:

> "Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

At first blush this section would not seem to advance Petitioner's position, for plainly Section 8(b)(4), the basis of the complaint here, is one of the impediments to striking specifically provided for in the Act itself. Therefore, it is somewhat circular reasoning to invoke this section with respect to any of the provisions of Section 8(b)(4), for its language throws the determination of any case back to the preceding specific provisions. The present case is quite unlike *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639,*

362 U.S. 274, where the Board's attempt to stop picketing by a minority union was predicated entirely upon Section 8(b)(1)(A). The language of that sub-section, unlike Section 8(b)(4)(A), does not explicitly refer to strikes or partial strikes and therefore had to be evaluated with other sections of the Act. As the Court correctly stated (id., 362 U.S. at 282):

> "Section 13 declares a rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike."

The real importance of the subsection, so far as Petitioner's argument is concerned, seems to be what this Court said in a footnote to the foregoing decision: ". . . picketing has been equated with striking for the purposes of Section 13" (id., 362 U.S. 281, n. 9).

With this proposition we have no quarrel, although the Court itself says nothing about the right to picket. The term "strike" used in Section 8(b)(4) and Section 13 of Title I of the Labor-Management Relations Act is defined in Section 501(2) as including "any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective agreement) and any concerted slow-down or other concerted interruption of operations by employees." Granted that Section 13 guarantees the right to picket as well as the right to strike, there is certainly nothing in this Court's treatment of Section 13 which would imply that the Act's *limitations* on striking have no application to picketing.

The very premise of Petitioner's position depends on a contrary assumption. In the *Drivers, Chauffeurs* case the Court quoted with approval the comments of Senator Taft on the effect of one of the proposed

amendments to the Labor Relations Act, 362 U.S. 287-288:

> "It seems to me very clear that so long as a union organizing drive is conducted by persuasion, by propaganda, so long as it has every legitimate purpose, the Board cannot in any way interfere with it.
>
> "The Board may say, 'You can persuade them; *you can put up signs;* you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.' As I see it, that is the effect of the amendment." (Emphasis supplied.)

The Court treated these remarks as reinforcing its conclusion that picketing even when employed for organizing purposes was not coercive. In other words, the Court recognized that picketing was as legitimate a means of communication as speech or writing. It did not say that it stands on any better footing.

When Congress in Section 8(b)(4) directed labor organizations to refrain from inducements and encouragements to strikes or partial strikes for specified objects, it obviously must have meant to prohibit the effectuation of such inducements or encouragements by any method of communication, including picketing. Petitioner may be correct in deriving from the right to strike protected by Section 13 the right to picket which it asserts in this case. The logic of its position would suggest that the two rights are co-extensive. The fallacy of Petitioner's argument is that it recognizes no such limitation on the scope of picketing.

Petitioner, of course, does not contend that merely by calling a strike at a factory it could then appeal by

letter or telephone to building trades or transportation unions not to work on the premises for independent employers who have business there, for that clearly would be an "inducement" under Section 8(b)(4)(A). It does claim this right if a picket line is on the premises, however. But if the pickets are there (as were the pickets at Gate 3-A) not for the purpose of "inducing employees of the primary employer to strike, and prospective replacements to refrain from taking the place of the strikers" (Pet. Br. 30), but simply to induce action by neutral workers, the presence of the pickets would be immaterial. Obviously such picketing is just a means of communicating. The forbidden signal so far as privilege is concerned, is no different from an oral or written message. Even the stoutest apologist for peaceful picketing has never urged that it enjoys a preferred position to free speech.

Conversely, to the extent that a strike is lawful, the Act is indifferent to the means of communication used by the striking union to induce, without coercion, the primary employees to join and continue the strike. The inducement may be accomplished by telephone, leaflet, or by picket signs. Thus the place where the picket signs are carried is immaterial so long as it can be fairly inferred that the object of the pickets is to reach the primary employees (or even the general public). *Local 618, Automotive, Petroleum, and Allied Industries Employees* v. *N.L.R.B.*, 249 F.2d 332 at 337 (C.A. 8) The traditional object of picketing a place where a struck employer is operating his business is, as Chief Judge Woodbury of the Court of Appeals for the First Circuit expressed it, the exertion of individual pressure on a non-striker "by embarrassing him into either joining the strike or quitting his job." *N.L.R.B.* v. *United Steelworkers*, 250 F.2d 184, 187.

2. Section 8(b)(4) proscribes inducement of a partial as well as a total refusal to perform services.

For some reason not altogether clear Petitioner stresses that its agents made no effort to deter employees of the various contractors from working on projects for other customers outside the struck plant. It is true that the record does show that employees of two of the contracting firms who ordinarily worked inside the General Electric grounds, were dispatched by their employers, after they had refused to cross the picket line, to other construction jobs.

Obviously this aspect of the matter does not constitute a legal defense to Petitioner's conduct unless there is some merit to the suggestion that because the construction workers were willing to perform some services, they had not been induced to engage in "a concerted refusal . . . to perform *any* services." Clearly this is an absurd reading of the statute for the term "refusal" is qualified by the word "where an object thereof is to force or require such employer. . . . to cease doing business with. . . ." Hence a refusal to perform *any* services for the purpose of forcing the contracting firms to cease doing business with General Electric, when instigated by Petitioner, was plainly contrary to the Act. The fact that it had no objection to the employees performing services unrelated to this illegal purpose is immaterial.

In another portion of its brief Petitioner concedes the frivolity of its argument on this point by recognizing that subsection 8(b)(4)(A) proscribed not only efforts to induce strikes, but also efforts to induce partial strikes (Br. 22).

3. The proviso to Section 8(b)(4) provides no defense for Petitioner's conduct.

The concluding proviso to Section 8(b)(4) is also referred to by Petitioner for the proposition that a striking union is free to induce employees of neutral employers to refuse to perform services "upon the premises of a struck employer" (Pet. Br. 38). Despite the citations to reported decisions, however, the Board has never so held. An examination of *N.L.R.B.* v. *Rockaway News Co.*, 345 U.S. 71, also reveals that this Court made no such holding

The very language of the proviso[6] shows that it created no exemption for labor organizations but simply for individual employees. A labor organization can scarcely be said to have an employer upon whose premises it could enter. Thus there is no basis for the contention made by Petitioner and the *amici* that under principles of free speech, labor organizations could induce individuals in concert to refuse to enter struck premises.

A more careful study of the legislative history of the Act than either brief contains would reveal the historic basis of this proviso which was included in S. 1126, the Senate version of the Taft-Hartley Act as

---

[6] The proviso reads as follows:

> "*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

reported from committee.[7] Originally the major provisions of Section 8(b)(4) and Section 303 were contained in Section 204 of a different bill, S. 55,[8] which in turn was a revision of the Case bill passed in the 79th Congress but vetoed by the President.

In S. 55 the prohibitions were not stated in terms of unfair labor practices by labor organizations but applied generally to any person engaging in such conduct. In this framework the proviso was necessary to relieve an individual employee from liability for treble damages under the antitrust laws. When this portion of S. 55 was revised and incorporated by the Senate committee into the amended Labor Relations Act, it was thought that its retention was desirable in order to clarify the distinction between individual and concerted conduct.

B. The Legislative History of the Act Discloses No Intent to Authorize Striking Unions to Instigate Concerted Stoppages by Employees of Neutral Companies.

1. Resort to legislative history is justified only where statutory language is ambiguous or would produce an absurd result. This is not the case here.

As previously noted the wording of Section 8(b)(4)(A) would obviously apply to the activity of Petitioner at the reserved gate. To avoid the plain meaning of the subsection, however, Petitioner's brief contains extensive citations to the Senate debates which, when analyzed, simply prove that the sponsors of the Act did not intend to proscribe strikes to obtain higher

---

[7] Legis. Hist. 99 at 114. "Legis. Hist." refers to the two volume work, "Legislative History of the Labor Management Relations Act, 1947" (G.P.O. 1948).

[8] The text of the corresponding section in S. 55 is printed in the Appendix of this brief.

wages or better conditions of employment. As this fact is self-evident from the language of the Act, particularly the language of Section 8(d), it is difficult to see why it was necessary to resort to the Congressional record.

The courts have held that it is necessary to examine legislative history only where statutory language is ambiguous or to avoid some clearly absurd and unintended result, e.g., *Holy Trinity Church*, 143 U.S. 457. Apparently as an excuse for departing from this well settled canon of construction, Petitioner quotes with approval a comment of Judge Rifkin in *Douds* v. *Metropolitan Federation of Architects*, 75 F.Supp. 672, 675 (S.D.N.Y.), and a similar comment by Judge Learned Hand in *Douds* v. *International Longshoremen's Association*, 224 F.2d 455, 459. Petitioner attributes to these judges the view that if Section 8(b)(4)(A) were taken literally, all strikes would be prohibited, irrespective of their primary character, since the result of any strike, if effective, would bring about a cessation of business between the struck employer and other persons (Pet. Br. 40). With all deference to these distinguished jurists, this point is not well taken.

From this rationale Petitioner reasons that "in this respect there is no distinction between a primary strike and a secondary strike" (Pet. Br. 40). There is a fundamental difference, however. The usual object of a primary strike is to obtain some economic advantage. The shut-down of operations and the ensuing disruption of business relationships are only a means to that end, whereas the object of inducing a stoppage of neutral operations is attained as soon as such employer ceases to do business with a company with whom the union has a dispute.

2. The contention that the Act was intended to prevent only what Petitioner characterizes as "secondary boycotts" is based on a distorted treatment of Congressional debates.

In any event, the legislative history, as a whole, discloses that Congress meant to outlaw all activities involving strike action against neutral employers. Petitioner's contention to the contrary is based on some general remarks of Senator Taft in the course of the debates which Petitioner cites as showing that Congress was aiming only at those strikes and inducements to strike which were familiar to it as "secondary boycotts."

(a) The Understanding of the Term By Congress.

One of the faults of Petitioner's argument is that from its own standpoint it proves too much. There is no doubt that Senator Taft and other managers of the bill, including his colleagues on the committee, Senators Ball and Ellender, did repeatedly use the term "secondary boycotts" to describe the intent of Section 8(b)(4), although the term itself is not used in the Act.

The official record of the debates reveals a general understanding that Section 8(b)(4) had a much broader scope than what most writers on industrial relations would describe as a secondary boycott. Many Senators used the term as if it were synonymous with picketing in a primary recognition strike. Thus Senator Ball, in urging the adoption of what is now Section 8(b)(1)(A), said:

> ". . . I have a story appearing in the New York Journal American of March 14, telling about how the employees of fuel concerns in Westchester County were being forced to join, against their wishes, a union as the price of keeping their job. In that case a picket line was thrown around the

plant after the employees refused to join a union. *It was a typical secondary boycott which is covered in another section of the bill.* Of interest is the comment of the owner of the business. He says that his employees, against their will, paid an initiation fee of $37.50 and joined the union." (Emphasis supplied.) 93 Daily Cong. Rec. 4138, April 25, 1947; 2 Legis. Hist. 1020-21.

Presumably the reference to "another section" was to Section 8(b)(4). On another occasion Senator Ellender referred to secondary boycotts the same way:

> "A secondary boycott, as all of us know, is a concerted attempt on the part of a strong union to compel employees to deal with them, even though the employees desire to be represented by other unions, or not to be represented at all." 93 Cong. Rec. 4255, April 28, 1947; 2 Legis. Hist. 1056.

Even the excerpt from the "Supplemental Views" of Senators Taft, Ball, Donnell, and Jenner, contained in the official Senate committee report on the bill, employs the term "secondary boycott" in reference to what Petitioner and the Board would undoubtedly regard as primary picketing:

> "There appears to be virtually no disagreement as to the complete injustice of secondary boycotts and jurisdictional strikes or as to the necessity of giving injured third parties a remedy against their operation. For the most part, it is the small employer, often with less than 50 employees, and the farmer or farm trucker who are the main victims of this type of racketeering union activity. To a small storekeeper, or machine shop, *picketed out of business by unions intervening between him and his employees*, or to the farmer prevented from unloading his perishable produce, the remedy of dealing with the NLRB is a weak reed . . ." (Em-

phasis supplied.) Senate Report No. 105 on S. 1126, Sup. Views, p. 54; 1 Legis. Hist. 460.

There is no reason to think that in the excerpts from Senator Taft's statements which appear in Petitioner's brief, containing disclaimers that the bill had any broader purpose than to outlaw "secondary boycotts" and "jurisdictional strikes," he was using the term "secondary boycott" in any more restricted sense. In fact he stated that the committee had never heard anyone "tell us any difference between different kinds of secondary boycotts", 93 Cong. Rec. 4323, April 29, 1947; 2 Legis. Hist. 1106. In reply to Senator Pepper, an opponent of the bill who had asserted that Section 8(b)(4) "is not limited to the secondary boycott. It is applicable as well to the primary boycott" (93 Cong. Rec. 4322, April 29, 1947; 2 Legis. Hist. 1105), Senator Taft admitted as much. He said:

> "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to strike because their employer happens to be doing business with someone the union does not like or *with whom it is having trouble or having a strike.* On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that." (Emphasis supplied) 93 Cong. Rec. 4323, April 29, 1947; 2 Legis. Hist. 1107.

It is also not without significance that whenever Senator Taft referred to the kind of strikes the proposed legislation would permit he always referred to disputes

involving the wages, hours and working conditions of the immediate strikers. At no point did he ever use the word "primary" to characterize this type of concerted activity.

(b) The Revision of Section 8(b)(4) in Committee

The foregoing illustrations from the legislative debates reveal that Petitioner has given a somewhat distorted picture of what the Congress actually understood Section 8(b)(4)(A) to mean. Far from demonstrating that Congress was merely outlawing product boycotts or picketing at the premises of a secondary employer, the remarks of both the proponents and opponents of this subsection show a recognition that not only the type of activity in question here was intended to be barred, but also certain kinds of "primary" action.

Moreover Petitioner's view that only product boycotts were intended to fall within the proscriptions of the subsection fails to take into account the evolution of its wording in the Senate committee. As the text of the corresponding section in S. 55 shows (Appendix A), the words "to cease doing business with any other person" were not included in that bill prior to its incorporation (and subsequent revision) into the text of the committee.

Obviously there would have been no occasion for adding these words to the list of proscribed objects, if the Senate committee had wished to confine the scope of the bill to product boycotts, for the language of S. 55 was adequate enough on this point. The very situation which the additional words were meant to encompass, for it had been brought to the attention of the committee in public hearings, was the practice of

striking unions (particularly in unpopular strikes) to bring additional pressure to bear by inducing union members employed by other companies to deny any services to the struck employer. Unless these words cover such conduct as Petitioner engaged in, the supplementary language added little or nothing to the original text.

3. The earlier Board approach cannot be regarded as sound precedent as it also reflects a highly inaccurate assumption of Congressional purpose.

(a) A Fragmentary Reading of Legislative History Caused the Board To Err In Its Earlier Interpretation of the Section.

Although it is urged that certain early decisions of the Board, notably *Pure Oil Co.*, 84 NLRB 315, *Ryan Construction Co.*, 85 NLRB 417, and *Schultz Refrigerated Service, Inc.*, 87 NLRB 502, correctly construed Section 8(b)(4)(A), and should not be overruled or limited as the Board has done in such recent cases as this, it is apparent that the rationale of those cases was the product of the same erroneous notion of legislative history to which Petitioner has resorted. The *Pure Oil* case which set the pattern is almost a classic example of how not to construe a statute.

This was a case concerning a loading dock shared by the Standard Oil Company with Pure Oil. The workers of both companies were represented by the same union but in separate bargaining units. A strike was called against Standard and the union picketed the dock. The Pure Oil employees at the direction of the union then refused to enter or to operate the picketed facilities, even though there was no dispute between the union and the latter company. Plainly the object was to force Pure Oil to cease doing business with Standard at the pier. The Board, however,

dismissed the complaint that had issued under Section 8(b)(4)(A).

In so doing, it abstained from any security of the wording of this subsection and without quoting it, declared:

> "It is clear from the legislative history that it was aimed at secondary and not primary action." 84 NLRB 315 at 318.

The Board then engaged in a most fragmentary study of the legislative history. It took from context Senator Taft's explanation that "all this provision of the bill does is to revise the effect of the law as to secondary boycotts," id., 84 NLRB 318. It completely ignored, however, language used by Senator Taft, as well as Senators Ball and Ellender, which showed that they were not thinking of secondary boycotts in the classic or even familiar sense of the term. Nor did the Board make any mention of the expanded revisions to S. 55 which had occurred in the Senate Committee.

The Board in quoting Senator Taft to the effect that "primary strikes over terms and conditions of employment are 'entirely proper' and 'throughout this bill are recognized as proper strikes'," 84 NLRB at 318, thereby implied that Senator Taft, who had never used the word "primary" had laid the groundwork for the Board's notion of the distinction between "primary" and "secondary" activity. From this dubious outline of the explanation of the bill's principal sponsor, the Board concluded "from the available legislative history" that Section 8(b)(4)(A) "does not outlaw any of the primary means which unions traditionally use to press their demands on employers."

Actually, the theory that Congress had meant to preserve the "primary means which unions traditionally use to press their demands on employers" was a figment of the Board's imagination, as the colloquy between Senators Taft and Pepper, previously quoted, reveals. Shortly thereafter the "primary action" theory was extended to cover what the Board called "primary situs picketing."

In a case which came before it, *Ryan Construction Co.*, 85 NLRB 417, later that year, the Board, relying on nothing except its own views of legislative history, held in a situation very much like the one with which the Court is confronted in this case that the gate of a struck factory providing access to the plant only for construction company employees was "primary picketing" and that "Section 8(b)(4)(A) was not intended by Congress, *as the legislative history makes abundantly clear,* to curb primary picketing" (Emphasis supplied).

In another year the Board was to hold that picketing of a truck at the premises of customers of the struck employer was also "primary", as the truck was a "roving situs". Manifestly any real attempt to appraise the Congressional history would have made it clear that such an interpretation of the statute was without warrant.

It is apparent from the sweep of these opinions that the Board by ignoring the language of the statute and resorting to imagination really conferred immunity upon some of the very abuses Congress sought to correct. This result could have been avoided by emphasizing that the legality of a picket line does not depend upon its location, but upon its object. Under this simple test unions would still be able to post picket

lines around employee entrances in primary strikes, even though their incidental effect might be to discourage employees of some other companies from entering, provided the pickets took no steps to bring about concerted action of this sort.

This Court itself has said that the situs of the picketing is not controlling, *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, and has found violations of Section 8(b)(4)(A) in situations where the picketing was conducted at the places where employees of the struck employer would normally report for work, *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675. It is submitted that the new approach of the Board which distinguishes between what is "unavoidable and incidental" and what is deliberate, so far as any impact on neutrals occurs, more closely conforms to the intent of Section 8(b)(4)(A) than the obscure and conflicting tests adverted to by the Board in the opinions commended by Petitioner.

(b) Contrary to the Board's Earlier Premise, a Strike Which Commands Rank and File Support Need Not Involve Neutrals In Order To Be Effective.

Implicit in some of the early Board cases which pushed to extremes the doctrine of primary situs immunity was the notion that unless strikers could shut off service from a struck employer by preventing personnel from other companies from entering the plant enclosure, the strike could not be effective. Petitioner in this case expressly urges this view upon the Court as a ground for supporting its strained interpretation of the Act.

Such an argument ignores the problems of industrial life. An experienced working force is an indispensa-

ble asset to any manufacturer engaged in the advanced technology of making electrical products. If all or a substantial part of such working force exercises its right to stop working until certain conditions are met, production would be severely crippled irrespective of whether services from truckers or construction contractors were still available. A trained working force cannot be readily replaced. Indeed, regulations of the Department of Labor prevent public employment offices from referring applicants for work to a struck plant. Moreover, very few workers, even if unemployed, can be induced to take the place of strikers because the prospect of being called a scab or a strike breaker, or inviting physical violence on the part of angry pickets is not an alluring one.

It is only where the great bulk of the workers do not feel that it is to their own interest to go out on strike that the strike leaders need a boycott by third parties in order to bring effective pressure upon an employer. It is obviously this kind of tactics that Section 8(b)(4)(A) was intended to prevent.

4. By disregarding the theory of primary situs advanced by the Board in Rice Milling, this Court rejected the proposition urged here by Petitioner.

(a) Contrary to Petitioner's Contention, the Rice Milling Decision Rested Solely On the Absence of Appeal to Concerted Activity.

Notwithstanding the language of this Court in *N.L.R.B.* v. *International Rice Milling Co., Inc.*, 341 U.S. 665, Petitioner urges *Rice Milling* as support for its thesis that any picketing at a primary situs is immune. Petitioner argues (Br. 66)

> "Upon this finding that the conduct of the pickets was primary rather than secondary the Court deemed it unnecessary to 'determine the specific objects toward which a union's encouragement of

> concerted activities must be directed in order to amount to an unfair labor practice.' "

The fact that no such finding is contained in the opinion is indicative of the liberties Petitioner has taken with this decision. Indeed, nowhere in the opinion is mention made of primary or secondary activity. Moreover Petitioner has glossed over what was apparently a tacit repudiation of the primary situs immunity theory.

Rice Milling in this Court dealt solely with the inducement by union pickets stationed at the entrance of a struck plant of two occupants of a truck, the driver and his helper, to refrain from making a pick-up at the struck plant. That this was the only matter before the Court is manifested by the Court's statement at the outset of its opinion that "this review is confined to the single incident described in the complaint," 341 U.S. at 668. Describing the arguments of the charging party, the Court dismissed these contentions in the following language, 341 U.S. at 670:

> "A sufficient answer to this claimed violation of the section [8(b)(4)(A)] is that the union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to 'concerted' activity as the section proscribed."

Although the precision of this language can leave no doubt that the Petitioner's reliance upon the decision is ill-advised, the full import of this Court's holding is made clear only by an analysis of the decision in the context of the holdings below. For had the Court wished to approve the Board's sweeping concept of primary activity in that case, it had only to adopt the situs theory pressed upon it by the Board, which was

the crucial issue before both the Board and Court below.

The Board in that case[9] specifically rejected the trial examiner's finding that the picketing activities attending the strike at the Kaplan Mill constituted a violation of Section 8(b)(4)(A), and rested its decision squarely on its notion of the protected nature of such activity at a primary situs. It stated:

> "The Trial Examiner also found that the Respondent violated Section 8(b)(4)(A) and (B) by attempting to prevent a Sales House truck from entering the Kaplan mill on Otober 21, 1947. We do not agree with this finding. The Respondent's activities arose out of the *primary* picketing of the Kaplan mill, and were carried out in the immediate vicinity of that mill. Violence of the picket line is not to be condoned, but violence does not convert *primary* picketing into *secondary* action within the meaning of Section 8(b)(4)(A) or (B)." [Original Emphasis]

Upon petition for review in the Court of Appeals for the Fifth Circuit,[10] the Court reversed the Board, predicating its decision upon the view that the Act nowhere differentiated between primary and secondary activities, and therefore the union's picketing violated the express proscriptions of the statute. The Court said:

> "We do not agree with the Board's holding that the union's activities in refusing to allow a truck owned and operated by grain warehousemen were

[9] *International Brotherhood of Teamsters, Local* 201 (*International Rice Milling Company, Inc.*), 84 NLRB 360.

[10] *International Rice Milling Company, Inc.* v. *N.L.R.B.*, 183 F.2d 21 (CA 5).

not violative of Section 8(b)(4)(A) and (B) of the Act. The Board assigns as the reason for its holding, the fact that the union's activities arose out of primary picketing, and that, since they were carried out in the immediate vicinity of the mill, they were not violative of the Act. The Board attempts to draw a fine distinction between primary and secondary action. . . .

"The statute clearly provides a remedy for the type of conduct engaged in by the union, without resort to any distinction between primary and secondary activities. . . ."

Although both the Board and the Court of Appeals saw the issue solely in terms of the locus of the picketing, this Court carefully framed its opinion in terms of an issue not alluded to in either forum. Focusing solely upon the "single incident" of inducement of the driver (with his helper) of a lone truck, this Court went on to say, 341 U.S. at 671:

"A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscriptions of Sec. 8(b)(4), and they do not here."

Finally, again reflecting the specific limited grounds of its holding in *Rice Milling*, the Court, in *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 687-688 (another case decided the same day), summarized its *Rice Milling* decision as follows:

"There the accused union sought merely to obtain its own recognition by the operator of a mill, and the union's pickets near the mill sought to influence two employees of a customer of the mill not

to cross the picket line. In that case we supported the Board in its conclusion that such conduct was no more than was traditional and permissible in a primary strike. *The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill.*" [Emphasis supplied.]

The precise and deliberate holding of the *Rice Milling* case, particularly in the context of its departure from the specific grounds of decision offered by the Board and the Court below, leaves no doubt whatsoever that this Court did not accept the view that there was an implied limitation on Section 8(b)(4)(A). Beyond that, however, the choice of a ground other than that primarily urged by the respective parties in their briefs (see 95 L.Ed. 1279) suggests this Court's reluctance to adopt the sweeping situs doctrine enunciated by the Board.

(b) Petitioner's Interpretation of Rice Milling Is Contrary to Congressional Understanding.

Petitioner insists (Br. 15, 71-72) that notwithstanding the explicit grounds upon which Mr. Justice Burton's opinion in the *Rice Milling* case rested, the Court of Appeals for the Sixth Circuit "clearly erred" in stating that the ruling "was based on the fact that the union sought concerted conduct on the part of the employees of the other employer," *United Brick & Clay Workers* v. *Deena Artware*, 198 F.2d 637 at 643, *certiorari denied*, 344 U.S. 897.

Petitioner's view, however, is not only at odds with the Sixth Circuit but is also in conflict with the understanding manifested by both proponents and opponents of the Landrum-Griffin substitute in the recent debates

preceding the passage of the Labor-Management Reporting and Disclosure Act. Thus Representative Griffin, a co-sponsor of the measure ultimately adopted by the House, stated in an analysis of his bill introduced that day, that the proposed change in Section 8(b)(4) was intended to overrule Rice Milling by making illegal the inducements of employees *one at a time* to engage in secondary boycotts.[11] He stated, 105 Daily Cong. Rec. 13091, 13092, July 27, 1959; II Leg. Hist. L.M.R. & D.A. 1522, 1523:[12]

> "Subsection (a) of this substitute is a revision of Section 8(b)(4) of the Taft-Hartley Act, which makes certain types of boycotts and jurisdictional strikes unfair labor practices. It is clear from the legislative history of the Taft-Hartley Act that Congress meant to outl . . all secondary boycotts. Unfortunately, various judicial and administrative decisions have held that the present language of section 8(b)(4) and Section 303 permit labor organizations to engage in some types of secondary boycotts with complete impunity. This has been one of the major weapons, as numerous hearings have disclosed, used by gangsters and racketeers who have infiltrated the labor movement.
>
> "Present law provides that it is unlawful for a union to induce or encourage 'employees of any

[11] This proposal, which was enacted into law, changed the statutory language "to engage in, or to induce or encourage the *employees* of any employer to engage in, a strike or a *concerted refusal*," so that it read, "to engage in, or to induce or encourage any *individual* employed by any person . . . to engage in, a strike or a *refusal* . . ." (Emphasis added).

[12] "Leg. Hist. L.M.R. & D.A." refers to the two-volume work, "Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959).

employer' to engage in strike or 'concerted refusal' to do their work for one of the forbidden objects listed in Section 8(b)(4)—such as to force their employer to cease doing business with a "primary" employer. Since farm laborers, railway labor, and supervisors are not 'employees' within the meaning of the Act, unions may now without penalty induce them to engage in secondary boycotts. This bill corrects this by changing the word 'employees' in the phrase quoted above to 'any individual employed by any person'. This change appears in clause 4(i).

"As the present act forbids inducing 'employees' to engage in a strike or 'concerted' refusal to do their work, the courts have held that unions may induce employees one at a time to engage in secondary boycotts.[2] *By changing 'employees' to 'any individual' and omitting the word 'concerted', the proposed revision of clause 4(i) closes this loophole.*" [Italics supplied].

---

[2] "N.L.R.B. v. International Rice Milling Co., 341 U.S. 665."

After the passage of the respective labor bills by both the House and Senate, but before the meeting of the conferees, two opponents of the Landrum-Griffin bill, Representative Thompson and Senator Kennedy, made particular reference to the impact of the House bill upon the *Rice Milling* decision. Expressing their understanding that *Rice Milling* protected only the inducement of single individuals, they maintained that if the proscription of the inducement of "concerted" activities were eliminated from the statute, the picketing activities in *Rice Milling* would constitute an unfair labor practice. On behalf of Senator Kennedy and himself, Representative Thompson stated, 105 Daily

Cong. Rec. 15221, August 20, 1959; II Leg. Hist. L.M.R. & D.A. 1707:

> "During the House debate it was asserted that section 8(b)(4) in its present form can be evaded by asking the employees of a secondary employer one at a time to refuse to handle the goods of the primary employer. This appears to be an inadvertent misstatement. When a number of employees refuse to handle goods at the same time each knowing that others will also refuse, there is a 'concerted refusal' within the legal definition of a conspiracy. And if the union induces 'the employees * * * to engage in * * * a concerted refusal,' it makes no difference whether the inducement is addressed to them simultaneously or consecutively.
>
> • • • • • • • • • •
>
> "The most serious objection to the so-called secondary boycott and hot cargo sections of the House bill is the effect which they may have upon primary picketing. An adequate explanation requires retracing our steps to the distinction between primary and secondary activity. . . .
>
> • • • • • • • • • •
>
> "Now suppose that the Carpenters Union puts a picket line around the factory which has the effect of turning back the drivers of independent trucking concerns. This kind of picketing has never been treated as a secondary boycott. It occurs at the factory of the employer primarily engaged in the labor dispute. It aims at halting commercial intercourse with him (a primary boycott), not at halting intercourse with persons who have intercourse with him (a secondary boycott). But if one follows through the literal words of the statute just quoted, it will be seen that a strong verbal argument can be made that the picketing at the factory violates section 8(b)(4)(A) because the pickets induce the truck drivers employed by the trucker not to perform their usual services where

an object is to compel the trucking firm not to do business with the door manufacturer during the strike.

"This problem was presented to the Supreme Court in *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 655. The Court held that picketing at the factory did not violate section 8(b)(4)(A) because the "applicable proscriptions of 8(b)(4) are expressly limited to the inducement or encouragement of concerted conduct by the employees of the neutral employer" and "there is no suggestion that the union sought concerted conduct." *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 671.

"The House bill proposes to take out of section 8(b)(4) any references to 'concerted' conduct or to two or more employees and to make it unfair to induce a single person not to perform services, thus overturning the reason for the Supreme Court decision. If this were done, the pickets who appealed to a truckdriver not to enter the plant where men were striking for higher wages could be held guilty of an unfair labor practice."

It is worth noting that the Congressional view is in accord with that expressed by the Sixth Circuit in *Deena Artware*. Indeed, inasmuch as *Rice Milling* was concerned with the pressure exerted by the pickets on the driver of a single truck (the driver's passenger obviously bearing no responsibility in his own right), this Court's holding can have no other meaning.

(c) The Footnote Reference To the Ryan Case Is Obviously Not An Adoption of the Ryan Doctrine.

In its brief Petitioner, after noting quite correctly (Br. 21, 50) that the Board's disposition of the instant case is inconsistent with its earlier espousal of *United Electrical & Machine Workers (Ryan Construction*

Corporation), 85 NLRB 417, proceeds to advance the farfetched notion that this Court has actually approved the Board's holding in *Ryan* (p. 21). Its reference is to a footnote in the *Rice Milling* case, 341 U.S. 672, n. 6, where the *Ryan* citation, one of a string of citations preceded by the notation, "See also," is listed as authority for the proposition set forth in the text of the decision, "That Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike has been indicated recently by this Court." This inconspicuous allusion to a dictum in *Ryan*, which merely expressed a non-controversial view, scarcely constitutes affirmance of the Board's basic holding therein.

The Board itself has acknowledged the limited import of its agreement with the Ryan reference. In *Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market)*, 116 NLRB 856, 859-860, the Board stated:

> "While the Supreme Court in *International Rice Milling Co., Inc., et al.* v. *N.L.R.B.*, 341 U.S. 665, 672, cited the *Ryan* case, such citation was merely in support of a dictum by the Court that Section 8(b)(4)(A) was not meant to 'interfere with the ordinary strike,' which general statement also appears in somewhat different terms in the Board's opinion in the Ryan case. It does not necessarily follow that, by such citation, the Supreme Court meant to indicate agreement with the Board's specific holding in Ryan that, where the picketed premises are owned by the primary employer, the picketing cannot for that reason be secondary action, even though such premises are used only by employees of secondary employers. Indeed, the Supreme Court expressly stated that the fact that the inducement of neutral employees in the Rice Milling case occurred at the premises of the primary employer was not necessarily controlling in

evaluating the legality of such inducement unde Section 8(b)(4)(A). In any event, the validit of the specific holding of the Board in *Ryan* wa not in issue in the *Rice Milling* case. We do no believe, therefore, that the reference in that cas to *Ryan*, whatever its significance, precludes ou reversal of *Ryan*.

II. THE 1959 AMENDMENTS TO THE ACT, IF ANYTHING RE... THE BROAD NOTION OF SITUS IMMUNITY ADVANCED B... PETITIONER.

A. Viewed In the Light Most Favorable to Petitioner, the Amendments Merely Beg the Question of What Constitutes Legitimate Primary Activity.

Petitioner has relied upon a statement in the House Conference Report that the Amendments were not intended to "overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute"[13] as a springboard for its comment that "While again use of the word 'secondary' was avoided, the proviso confirms that now, as from the beginning, the prohibitory language must be read as applicable only to secondary strike action and its inducement" (Br. 46). Petitioner reads far too much into the Conference Report, for in the light most advantageous to the union the quoted language does no more than to recognize the validity of Board and court decisions which antedate the issuance of the Report.

Apart from the question whether the effect of the Committee's language is to place additional limitations

---

[13] H. Rep. No. 1147, 86th Cong. 1st Sess., p. 38, I Leg. Hist. L.M.R. & D.A. 942.

Petitioner conveniently ignored the next sentence of the Conference Report, that "this provision does not eliminate, restrict or modify the limitations on picketing at the site of a primary labor dispute that are in existing law."

upon the primary situs doctrine it is crystal clear that reference to the House Report's concern with primary strikes and primary picketing at best begs the question of whether the instant picketing is illegal. Although the Report lends color to the argument that an observable distinction between primary and secondary picketing has been created by judicial and administrative interpretation, it does not spell out the line of demarcation betwen the two and indeed sets forth no definitional criteria in the least helpful to Petitioner.

B. Proper Analysis of the Conference Report, However, Reveals That It Recognizes Sharp Restrictions Upon Situs Picketing As Declaratory of Existing Law.

Contrary to what Petitioner would have us believe, viz., that the Conference Report's observance of the distinction between primary and secondary picketing confirmed or ratified the legality of the picketing in the instant case (Br. p. 73), the cases cited in the report indicate legislative disapproval of the picketing in issue here. While we recognize, of course, that the 1959 Amendments, passed after the occurrence of the events herein, have no direct bearing upon the resolution of the question of legality, they nonetheless are helpful as a reflection of Congressional understanding of the law then applicable.

The pertinent portion of the text of the House Conference Report, including the four cases cited in support of its declaration, is set forth in our summary of argument (p. 17). Although Petitioner contends that the statement accorded approval to the broad primary situs theory, in actuality the cases cited as support for the statement are illustrative of *restrictions* placed by the Board and courts upon situs picketing, i.e., that the four cases in effect corroborated the immediately pre-

ceding sentence rather than the section as a whole. In *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, the Supreme Court affirmed the Board's proscription of union picketing at a general construction site designed to force the general contractor to terminate the subcontract of a contractor with which it had a dispute. In the *Pittsburgh Plate Glass* case, 110 NLRB 455, the Board relying on *Moore Drydock,* held that a picketing union had violated 8(b)(4)(A) by directing its efforts to the employees of neutral employers working at the job situs through its failure to disclose by appropriate picket signs its dispute with the primary employer alone. The *Washington Coca Cola* case, 107 NLRB 299, prohibited the expansion of picketing activities from the trucks which supplied Coca Cola to retail stores to entrances of the stores used by employees of other employers.

The remaining cited case, *Moore Drydock,* set forth specific criteria under which picketing at a common situs, presumably illegal otherwise, is considered legitimate. This opinion has traditionally (and correctly) been construed as a limitation upon a broad conception of a primary activity. With this in mind, the inclusion of this decision and the omission of certain others from the Conference Report assumes significance. Had the Committee wished to ratify the extreme view of primary activity, it had only to cite such early Board cases as *Ryan, Schultz Refrigerating,* 87 NLRB 502, or *Pure Oil Company,* 84 NLRB 315.

Moreover, the conferees were well aware of the inroads made upon such dubious precedents by more rational later interpretations of the Board. The *Crystal Palace* decision, *supra,* which foreshadowed the ultimate rejection of the *Ryan* doctrine, was given wide

publicity at the time of its issuance in the autumn of 1956. It was featured in the weekly Labor Relations Reporter, published by the Bureau of National Affairs, Inc., on September 3, 1956. Indeed, the Board's decision in the instant case was handed down more than two months before the execution of the Report, and even before the Congressional debates concerning the Landrum-Griffin bill. This decision appeared in the Labor Relations Reporter of June 22, 1959, at the same time that the Reporter noted in its lead article that the House Labor Committee was drafting legislation based upon the Kennedy bill. It is impossible to reconcile these happenings with the assumption of *Amici* that the legislators were unaware of these developments or with Petitioner's contention that the Conference managers disapproved the so-called "new approach" to situs picketing.[14]

---

[14] The failure of Congress to do anything about the separate gate cases, which occurred before the passage of the amendments to the Act, indicates Congressional acquiescence in the rule of decision. This general understanding was manifested by the comments of certain legislators the following year when the House dealt with the "situs picketing" bill. This bill, H.R. 9070, was reported out of the House Committee on Education and Labor in April, 1960 and was intended to amend Section 8(b)(4) by legitimizing certain picketing at construction sites. Representatives Frelinghuysen and Goodell, who voted to report the bill, made clear their understanding that it would not overturn the Board and Circuit Court decision in the instant case. In their published supplemental views to the report, after noting that "we feel it advisable to submit these supplemental views to emphasize what this bill does do and what it *does not do*" (original emphasis), they went on to say:

> "The bill strikes precisely at the inequities at which it is aimed. It is limited to employers 'who are in the construction industry'. Thus, it is clear that the employees of an industrial plant which is undergoing new construction or repair

C. In Any Event, the Moore Drydock Limitations Prohibit Picketing At the Reserved Gate.

Neither the Petitioner (Br. 54, 56-57) nor the *amici curiae* (Br. 24-27) seem to quarrel with the propriety of the criteria laid down by the Board in *Moore Drydock Company,* 92 NLRB 547, to restrict picketing activities at a common situs, i.e., a premises shared by two or more employers. Indeed they cannot, in view of the Conference Report's confirmation of *Moore Drydock* as declaratory of existing law. Their disagreement seems to lie with any application of its standards to the instant case on the theory that the General Electric premises were not a "common situs."

The *Moore Drydock* decision represents an attempt of the Board to extricate neutral employers, necessarily enmeshed to some degree in a primary dispute because they share premises with a struck employer, from the impact of a picket line established against the primary employer. To this end, the Board stated four conditions which must be met in order to legitimize picketing activities at common premises, viz:

---

would not be permitted by this bill to engage in activities which would induce employees of contractors or subcontractors engaged in such construction or repair to strike. The so-called 'separate gate' cases (*General Electric Corp.*, 123 NLRB 180; *I.U.E.-AFL-CIO* v. *N.L.R.B.*, U.S. Court of Appeals for D.C., 15205, Apr. 18, 1960) are not affected by this proposal. The reverse situation would also be outside of the exception provided by the bill. Employees of the independent construction contractors and subcontractors would not be free under the proposal to picket separate gates established for production employees. Generally speaking, the industrial plant would not be an 'employer in the construction industry' within the meaning of the bill."

House Report No. 1556, Part 2, 86th Cong., 2d Sess., Supplemental Views, p. 20.

"(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer." (92 NLRB at 549.)

1. The picketing falls far short of Moore Drydock's minimal safeguards.

Member Fanning, in his special concurrence in the Board decision now under review, held that Petitioner had violated two of the *Moore Drydock* standards in that the picketing at Gate 3-A "was not reasonably close to the *situs* of the labor dispute with General Electric and that picketing at this Gate did not clearly disclose that the dispute was only with General Electric and had not been extended to the neutral employers of the employees using that Gate" (R. 46). Both conclusions, we submit, were soundly based.

To be sure, the placards carried by the pickets at Gate 3-A declared "Local 761, On Strike, GE Unfair," in nominal compliance with the *Moore Drydock* condition that "the picketing disclose clearly that the dispute is with the primary employer." But the implication of the placards was belied by the actions of the union officers and the pickets themselves, who gave the impression the dispute was one involving the neutral contractors as well. Thus, when a construction worker arriving at Gate 3-A inquired about the picket line, he was informed by a picket patrolling there that construction men were not going in (R. 85). Moreover, when a group of construction workers approached Gate 3-A and asked the pickets stationed there if they

could enter, they were categorically told to "Go home" (R. 105, 106). Other contractor employees, displaying their stickers showing they were employed by contractors, were nonetheless turned away at Gate 3-A (R. 85, 105, 109). That strike activities were aimed at the employees of independent contractors was made clear by the statements of Petitioner's officers who, in response to a contractor's request for the union's permission to allow his employees to enter Gate 3-A, told him that "you can appreciate that we have a picket line up over there" (R. 92) and refused to grant permission (R. 93-95). In the face of these utterances, the placard reference, "GE Unfair," fades to insignificance.

The Petitioner was even more remiss with respect to the criterion that "the picketing is limited to places reasonably close to the location of the situs." This limitation was met by the Union in *Moore Drydock* when it picketed at the gate to the shipyard after permission was denied it to picket at the pier where the picketed ship was located. There, it was found that the pickets were stationed "as close to the *Phopho* as they could get under the circumstances," 92 NLRB at 550. The validity of the *Moore Drydock* safeguard is clear. When access is available to the locus of the dispute the picketing should be confined to that area. Evidence that a union is making no attempt to insulate the neutral employer from a dispute not his own should fairly create an inference that its object was not "primary."

Here Gate 3-A, situated some 200 yards from Gate 3 used by General Electric's employees (R. 16), was surely not reasonably close to the situs of the dispute for access to the employees directly involved was available to, and used by, the pickets. Nor can the patrolling of Gate 3-A be dismissed as an accidental spilling over of picketing activities at the primary situs, since

the distance between gates was too great to permit such a happenstance. In any event the record is clear that the picketing of Gate 3-A was deliberate.

2. The union's attempted distinction between manufacturing cases and other common situs bases is baseless.

Both the Petitioner and the *amici curiae* contend that the fact that services are performed by the aggrieved employer for the struck employer legitimates picketing avowedly aimed at the neutral. Petitioner states (Br. 53-54):

> "But employees of the neutral employer may be called upon to perform work or services involving the primary employer while he is on the premises. To the extent that the business transactions which take place there entail the performance of such work or services, the neutral employees are subjects of lawful inducement to refrain from performing them."

But this, as Petitioner was compelled to admit (Br. 3), is precisely the setting of the *Moore Drydock* case, which gave rise to the limitations upon picketing. There, the struck employer was the owner of a vessel, the *S. S. Phopho*, which was tied up at Moore's pier, and that Moore's employees could perform repair and overhaul on it. Clearly if the union in that case had run afoul of any of the four standards, e.g., if it had been granted permission to picket at the pier and nonetheless chose to picket where it did, an unfair labor practice charge would have merit irrespective of the fact that the innocent neutral performed services for the struck employer.[15] Indeed, contrary to Petitioner's

[15] Perhaps recognizing this pitfall, the brief of *amici curiae* asserts (p. 26) that "the present case would be analogous to *Moore Drydock* if it had been the employees of the contractors, rather

"new approach" to the *Moore Drydock* case, the Board itself in an exposition of the principles underlying *Moore Drydock*, emphasized the intent to confine boycott activities to employees of the primary employer alone. In the *Crystal Palace* case, which as we have noted, was presumably known to Congress at the time of the House Conference Report, the Board stated, 116 NLRB at 858:

> "In developing and applying these standards, the controlling consideration has been to require that the picketing be so conducted as ***to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees***" (Original emphasis).

Petitioner's distinction of *Retail Fruit and Vegetable Clerks Union* v. *N.L.R.B.*, 249 F.2d 591 (CA 9) enf'g *Retail Fruit and Vegetable Clerks Union (Crystal Palace Market)*, 116 NLRB 856, is equally threadbare. Petitioner maintains, contrary to fact, that the picketed neutrals, lessee-concessionaires who operated market stalls in a supermarket owned by the struck employer, Long, were not performing services for him. But not only did Long receive rent from these lessee-concessionnaires, but the amount of rent was calculated upon a percentage of the tenants' receipts over a fixed minimum. Obviously the disruption of their business had as much impact upon Long as the curtailment of the contractors' operations had upon General Electric. Moreover, insofar as customers were no doubt induced to patronize the supermarket because of items sold by

---

than the employees of General Electric, who had been on strike". But this of course is a misconception of the facts of the *Moore Drydock* case, for as we have seen, it was the neutral employer who was there performing services for the struck vessel.

the concessionnaires which they wished to purchase, the closing of the leased departments would have an additional adverse effect upon Long in that his own operations in the market would suffer.

Actually there is no valid distinction between this case and *Atomic Products and Production Workers*, 120 NLRB 400, enforced by *per curiam* opinion, sub nom., *Office Employees International Union* v. *N.L.R.B.*, 262 F.2d 931 (CADC). In that case, as in this one, the primary employer's business was conducted in a plant which could be approached through various gates. Just prior to the strike and with warning of it, one gate was set aside for the use of the employees of independent contractors, their employees and materialmen. Despite the restricted use of this gate, however, the striking union placed pickets there as well as at other entrances, thereby dissuading the contractor's employees from entering. The Board viewed this as a breach of Section 8(b)(4)(A) and despite a challenge by the union to the Board's "finding" (id. 932)), the Court found no error and enforced the order.

There, the trial examiner, observing that the picketing occurred at places near the secondary employers businesses, found that such activities "disclose a motivation for the picketing in remote places to be the influencing of employees of secondary employers." Accordingly, he found the picketing to be violative of the Act. Since both the Board and the Court affirmed without discussion, presumably this constituted the basis of their holdings.

It is clear from the words of the Act that a neutral employer does not lose his protection from embroilment in a strike simply because he does business with the

struck employer. Yet, reduced to its essentials, Petitioner's argument would legalize picketing directed against neutrals if they service the struck employer, and make illegal picketing activities directed against persons having no business whatsoever with him. This is obviously absurd, inasmuch as the Act's proscription of activities designed to induce cessation of business with the struck employer surely contemplates a business relationship between the aggrieved and the struck employer.[16]

---

[16] Assume, for example, that a union, having a dispute with an insurance company located in an office building also occupied by tenants having no connection with the struck company, placed a picket line at the entrance to the building. Presumably it is this sort of picketing that Petitioner would say is illegal, for none of the office personnel of the other tenants would have a business relation with the insurance company. Yet it would appear that the picket line inducement of the employees of the other tenants (performing no services for the struck company), although deterring them concertedly from entering the premises, would not be violative of Section 8(b)(4) because an object of the activity was not to compel any of their employers to cease doing business with the insurance company.

CONCLUSION

For the reasons set forth above, the judgment below ould be affirmed.

Respectfully submitted,

GERARD D. REILLY
LAWRENCE T. ZIMMERMAN
1120 Tower Building
Washington 5, D. C.

THOMAS F. HILBERT, JR.
570 Lexington Avenue
New York 22, New York

Attorneys for General Electric Company

ILLY AND WELLS
1120 Tower Building
Washington 5, D. C.

Of Counsel

bruary 28, 1961

APPENDIX

Excerpt from S. 55, 80th Congress, 1st Sess.; introduced by Mr. Ball (for himself, Mr. Taft and Mr. Smith).

A BILL

"To provide additional facilities for the mediation of labor disputes affecting commerce, to improve the procedures of collective bargaining, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

* * * * * * * * * *

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

"SEC. 204. (a) It shall be unlawful to make any contract, or to engage in any combination or conspiracy, in restraint of commerce or impeding the free flow of commerce, if one of the purposes of such contract, combination, or conspiracy is by strikes or threats to strike, or violence or threats of violence, or by concerted refusal of employees in the course of their employment to use, handle, transport, or otherwise deal with or work on specific articles or materials—

"(1) to force or require any employer or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products, as such, of any other producer, processor, or manufacturer; or

"(2) to force or require any employer to recognize, bargain with, or comply with the demands of a labor organization with respect to any employees, or to employ members of a labor organization for any particular employment, if with respect to the employees or the employment in question such employer is not required under the

provisions of the National Labor Relations Act to recognize or bargain with such labor organization.

"Nothing contained in clause (1) of this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

"(b) Whoever violates the provisions of subsection (a) shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

"(c) The district courts of the United States shall have jurisdiction in proceedings instituted by or on behalf of the United States, or by any party suffering loss or damage or threatened with loss or damage by reason of any violation of subsection (a), to prevent and restrain violations of such subsection. It shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings to prevent and restrain violations of such subsection.

"(d) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

"(e) The provisions of sections 6 and 20 of the Act

entitled "An Act to supplement existing laws against unlawful, restraints and monopolies, and for other purposes," approved October 15, 1914, and the provisions (except sections 11 and 12) of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932, shall not be applicable in respect of violations of subsection (a), or in respect of any contract, combination, or conspiracy in restraint of commerce, if one of the purposes of such contract, combination, or conspiracy is to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any material, machines, or equipment."

E COPY

No. 321

MAR 23 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

AND

GENERAL ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

BENJAMIN C. SIGAL,
EDMOND F. ROVNER,
DAVID S. DAVIDSON,
1126 16th Street, N.W.,
Washington 6, D. C.

MOZART G. RATNER,
1411 K Street, N.W.,
Washington 5, D. C.

Attorneys for Petitioner.

HERBERT L. SEGAL,
403 Republic Building,
Louisville, Kentucky,

Of Counsel

INDEX

	Page
Argument	1
I. The Board's Decision Is Not a Product of Administrative Expertise Exempt from Judicial Review	3
II. The Board's Redefinition of "Primary" and "Secondary" Cannot Be Justified under *Denver* and *Langer*	10
III. The Duration Test is Incompatible with Section 8(b)(4)(A)	14
Conclusion	19

Authorities Cited

Cases:

Albert Evans, Trustee of Local 391, Teamsters (Thurston Motor Lines), 110 NLRB 748	7
Brewery & Beverage Drivers, Local 67 (Washington Coca Cola), 107 NLRB 299	7
Chauffeurs, Teamsters, Warehousemen & Helpers (Hoosier Petroleum Company, Inc.), 106 NLRB 629	13
Hotel Employees Local No. 225 v. *Leedom*, 358 U.S. 99	17
International Brotherhood of Electrical Workers v. *N.L.R.B.*, 341 U.S. 694	3, 10
International Hod Carriers, etc. v. *N.L.R.B.*, No. 800, this Term, Petition for Writ of Certiorari filed March 11, 1961	12, 18
International Organization of Masters, Mates & Pilots, Etc., 125 NLRB 113	11
Local No. 36 International Chemical Workers Union (Virginia-Carolina Chemical Corp.), 126 NLRB 905	5
Local 618, Automotive Employees Union (Incorporated Oil Co.), 116 NLRB 1844	6, 7
Local 657, International Brotherhood of Teamsters, Southwestern Motor Transport, Inc.), 115 NLRB 981	7

Page

Local 1976, Carpenters Union v. *N.L.R.B.*, 357 U.S. 93 8, 12, 14
Metal Polishers, Buffers, Platers and Helpers (Climax Machinery Company), 86 NLRB 1243 12, 13
N.L.R.B. v. *Denver Bldg. and Construction Trades Council*, 341 U.S. 675 3, 8, 10, 13
N.L.R.B. v. *Drivers Local 639*, 362 U.S. 274 4
N.L.R.B. v. *International Rice Milling Co.*, 341 U.S. 665 3, 8, 10, 16
Newspaper and Mail Deliverers' Union (Interborough News Company), 90 NLRB 2135 11
Office Employees International Union, Local No. 11, AFL-CIO v. *N.L.R.B.*, 353 U.S. 313 17
Piezonki, d b/a Stover Steel Service v. *N.L.R.B.*, 4 Cir., 219 F. 2d 879 18
Printing Specialties and Paper Converters Union, Local 388 v. *LeBaron*, 9 Cir., 171 F. 2d 331 11
Printing Specialties and Paper Converters Union (Sealright Pacific, Ltd.), 82 NLRB 271 11
Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547 6, 9, 11
Sales Drivers, Local 859 (Campbell Coal Company), 110 NLRB 2192 7
Schauffler v. *Local 30, Roofers*, D. Del. No. 2286, decided February 10, 1961, 47 LRRM 2576 15
Seafarers International Union (Salt Dome Production Co.), 119 NLRB 1638 7
Securities & Exchange Commission v. *Chenery Corporation*, 318 U.S. 80 5, 17
Securities & Exchange Commission v. *Chenery Corporation*, 332 U.S. 194 7
Union de Trabajadores (Gonzales Chemical Industries), 128 NLRB No. 116 6
United Steelworkers of America (Phelps Dodge Refining Corporation), 126 NLRB 1367 5

Legislative Materials:

102 Cong. Rec. (March 23, 1956) 5455 4
102 Cong. Rec. (July 9, 1956) 12070, 12076 4
102 Cong. Rec. (July 27, 1956) 15550 4

Miscellaneous:

	Page
Carroll, *Through the Looking Glass*, Peter Pauper Press, p. 106	8
Cox, *Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257 (1959)	13
Jenkins, *The NLRB's New Thinking—Six Months After*, Address before the Southwest Area Conference on Industrial Relations at Houston, Texas, May 13, 1960, p. 9	4
Wirtz, *Board Policy and Management Relations: "Employer Persuasion"*, New York University Seventh Annual Conference on Labor, 79 (1954)	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 321

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

AND

GENERAL ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

The Board in its brief has conceded or failed to take issue with a number of our principal contentions. Consequently, as between Petitioner and the Board the issues have substantially narrowed. The Board admits that Congress intended Section 8(b)(4)(A) to be read as outlawing

only "secondary" strikes and "secondary" concerted refusals. (Bd. Br., pp. 13-15; Pet. Br., pp. 39-46). It does not take issue with our demonstration that the traditional object of primary picketing is to evoke a sympathetic boycott of the primary employer at the situs of a dispute, that sympathetic primary boycotts are essential to effective strike pressure, and that the Act preserves the right to induce neutral employees to engage in a sympathetic primary boycott (Bd. Br., p. 20; Pet. Br., pp. 29-39). Furthermore, the Board admits that Congress conceived of the primary-secondary distinction in traditional terms[1] (Bd. Br., 14-15, n. 3). The Board concedes, also, that it has abandoned the initial *Moore Dry Dock* approach and adopted a new approach (Bd. Br., p. 24). Thus, its ultimate differences with Petitioner reduce to its assertions (1) that its new definitions of the terms "primary" and "secondary" in common situs cases, reflect administrative judgments which the courts cannot disturb (Bd. Br., 50-51); (2) that the *Denver* decision left it free (Bd. Br., p. 14) to jettison the original approach predicated on the terms of the Act, the legislative history, tradition and the common law and to adopt such new definitions (Pet. Br., pp. 46-62); and (3)

---

[1] It contends, however, that this is no help in common situs cases because none of the examples cited in the legislative history was a common situs case and allegedly, the situation where two employers are engaged in business at a common situs "does not present a traditional or typical problem" (Bd. Br., p. 42). That assertion, however, ignores the construction situs cases cited in our main brief at p. 27, n. 11.

GE's contention that Congress did not conceive of the primary-secondary distinction in traditional terms (Br., pp. 26-30, 33, 35-36), rests on excerpts which appear to show that Senators Ball and Ellender conceived of minority recognition picketing as a secondary boycott. The conclusive answer is that Congress knew it was not a secondary boycott for Congress enacted Section 8 (b)(4)(c) to deal with the latter problem. See *N.L.R.B.* v. *Drivers Local Union 639*, 362 U. S. 274, 284.

that the duration test which it now says is the essence of the new definitions is compatible with Section 8(b)(4)(A) (Bd. Br., 32-36).

I. THE BOARD'S DECISION IS NOT A PRODUCT OF ADMINISTRATIVE EXPERTISE EXEMPT FROM JUDICIAL REVIEW.

Critical to the Board's brief is its assertion (Br., pp. 24, 50, 51), that the Board's new approach to the primary-secondary distinction is a product of reevaluation of relevant criteria based on "administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the * * * facts". On the basis of this unsupportable assertion it asks this court to conclude that the new approach constitutes "an allowable judgment which [the courts] cannot disturb". The truth is, however, that the new approach was not the product of experience, but of a change in Board personnel. The value judgments it reflects are not based on the relevant statutory criteria, but on economic and political predilections of individual Board members. The "complexities" are not inherent in the problem, but are artificially engendered by the attempt to dress the new approach in the garb of the old (Pet. Br., pp. 76-82). The facts are not "responsibly treated", and, most important of all, the new approach usurps a function which Congress did not delegate to the Board, but reserved to itself. (Pet. Br., pp. 100-103).

In the first place, reevaluation did not begin in 1951, when this Court decided *Rice Milling*, *Denver* and *Langer*.[2] It began in 1953, with the change in composition of the

[2] *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665; *N.L.R.B.* v. *Denver Bldg. and Construction Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694.

Board.[3] Chairman Leedom subsequently admitted t
statutory interpretations were predicated on the "econo
and political views" of the new members. He defen
on the ground that changes "in the interpretation of
law [are] not inconsistent with the statutory scheme of
tinuous change in the personnel comprising the tribuna
102 Cong. Rec. 12076 (3) (July 9, 1956). Member Jenk
recently revealed the new Board members' concept of th
function when, after this Court reversed *Curtis*,[4] he
plained that the Board had decided that case the way
did because "(1) If [the conduct at issue] wasn't agai
the law, it ought to be, and (2) if the Supreme Court
the United States overruled us it would at least bring
the attention of Congress a loophole in the law whic
might remedy."[5] The Board's brief admits that the
definitions of "primary" and "secondary" reflect the vie
of the individual members as to the amount of econo
pressure which is "adequate" for a union to exert on
primary employer in a common sifus case and the amo
of protection against "enmeshment" in a labor disp
which neutral employers should enjoy. (Cf. Br. for P
pp. 80, 86-89, 101 with Board brief, pp. 30, 33-34, 49-

---

[3] See 102 Cong. Rec. (March 23, 1956) 5455; 102 Cong.
(July 9, 1956) 12070; 102 Cong. Rec. (July 27, 1956) 15550.
also Wirtz, *Board Policy and Management Relations: "Empl
Persuasion,"* New York University Seventh Annual Conference
Labor, 79, 106 (1954): "* * * the new law of employer persua
traces directly to the results of the national election of 1952 an
the consequent appointment to the Board of a majority more
sponsive than the predecessor majority to the sentiments, or exp
ence, of employers."

[4] *N.L.R.B.* v. *Drivers Local Union 639*, 362 U.S. 274. See B
for Petitioner, p. 103.

[5] Jenkins, *The NLRB's New Thinking—Sixth Months After*,
dress before the Southwest Area Conference on Industrial Relat
at Houston, Texas, May 13, 1960, p. 9.

Far from bearing the hallmarks of expertise, the Board's new approach did not proceed, as the administrative process requires (*Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 92), by articulation of premises underlying a reasoned value judgment applied to particular facts.[6] Often the Board merely recited a variety of facts without explicating the significance of any. Rationalization was offered only afterwards, in subsequent decisions or, more frequently, in the briefs of Board counsel to the courts. In these *post hoc* formulations facts which the Board had ostensibly relied upon were disregarded and new insights supplied.

The series of decisions which begins with this case (see Brief for Petitioner, pp. 89-91), is illustrative. Here the Board stressed that "many of [the neutral] contractors had been working [at Appliance Park] for several years prior" to the present dispute (R. 39; Cf. Bd. Br., pp. 8, 17, 32). But in the *Virginia-Carolina* case, 126 NLRB 905, only a short time later, the Board applied the same rule where the contractors and their employees did not come on to the situs until after the strike began. 126 NLRB, at 908-909. In the instant case the Board stressed that the separate gate had been established for the exclusive use of independent contractors long before the strike (R. 39-40); In *Phelps Dodge*, 126 NLRB 1367, 1371 (Pet. Brief, p. 90, n. 36), the Board reached the same result although the separate entrance was created shortly before and in contemplation of the strike. In *Virginia-Carolina*, 126 NLRB 905, 908, 910 (Pet. Br., p. 90), the Board reached

---

[6] Although the new approach dates from December 1953, the Board did not even begin to articulate the rationale until 1955 (see Petitioner's brief, pp. 76-80); the *Crystal Palace* case, in which the Board first undertook to reverse *Ryan* (Bd. brief, pp. 26-27), was not decided until August, 1956.

the same result although the separate entrance was created after the strike. In this case the Board stressed that the entrance to the plant used by the contractor's employees was remote from the other gates and that employees of the primary employer were barred from using it; (R. 38-40, and 38, n. 2, 40, n. 5, 42); in *Gonzales*, 128 NLRB No. 116 (Pet. Br., p. 91), the Board reached the same result where employees of the neutral contractors and of the primary employer used the same entrance.

In the instant case the only rationale the Board offered was that "the Respondent's object in picketing at gate 3-A was to enmesh * * * employees of neutral employers in its dispute with the Company" (R. 42). The majority of the Board did not accept Member Fanning's invitation to rationalize the result in *Moore Dry Dock* common situs terms (R. 45-46).[7] In *Virginia-Carolina* the Board was equally cryptic, admitting only that it had in the *General Electric* case overruled *Ryan*. In *Gonzales* the Board declared that the function of the "duration" test was to determine whether a case fell in or out of the common situs category and that when it did the *Moore Dry Dock* common situs standards apply. Paradoxically, Member Fanning, who unsuccessfully urged the *Moore Dry Dock* common situs approach in the instant case, dissented in *Gonzales*. Now, for the first time, in this Court, Board counsel tells us that the duration test applies here and that its rationale is the difference in degree of potential damage to neutral employers (Bd. Br., pp. 33, 49).

---

[7] This followed naturally from *Incorporated Oil*, 116 NLRB 1844, where the Board had declared that absent a simultaneous appeal to employees of the primary employer, common situs criteria are inapplicable. 116 NLRB, at 1847 (Pet. Br., pp. 78-79). There was, of course, no simultaneous appeal to G. E. employers at Gate 3-A.

This history of rationalization is typical of the whole new approach.[8]

More fundamentally, however, the question posed by the Board's defense—that the new definitions represent a judgment which the courts cannot disturb—is whether definitions which reflect the economic and political value judgments of individual Board members as to the weight to be accorded conflicting interests of labor and management are of the kind "which Congress had indicated [are] for the [Board] to make". *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 209. Did Congress really endow Board members with Humpty Dumpty's

---

[8] Compare *Brewery & Beverage Drivers, Local 67 (Washington Coca Cola)*, 107 NLRB 299, decided on the facts without any expressed rationale, with *Albert Evans; trustee of Local 391, Teamsters (Thurston Motor Lines)*, 110 NLRB 748, decided "For the reasons stated by the Board in the Coca Cola case" 110 NLRB, at 754, and *Sales Drivers, Local Union 859 (Campbell Coal Company)*, 110 NLRB 2192, decided "for the reasons stated in *Washington Coca Cola Bottling Works, Inc.*, 107 NLRB 299, aff'd. in *Thurston Motor Lines, Inc.*, 110 NLRB 748", 110 NLRB, at 2194. It was not until *Local 657, International Brotherhood of Teamsters (Southwestern Motor Transport, Inc.)*, 115 NLRB 981, that the Board articulated the reasons it claimed to have stated in *Washington Coca Cola*, reasons based entirely on the Board's notion of what amount of pressure was adequate for a union to exert. See Pet. Br., pp. 86-89. Similarly, compare *Local 618, Automotive Employees Union (Incorporated Oil Co.)*, 116 NLRB 1844, decided narrowly on the basis of the particular facts before it with special emphasis on a finding that the picketing was "harassment", the timing of the appearance of the pickets which was of "paramount significance", and the absence of the primary employees at the picketed site, 116 NLRB at 1846-1848, with *Seafarers International Union (Salt Dome Production Co.)*, 119 NLRB 1638, decided on the sole basis of the absence of primary employees at the picketed site where the other two of the three factors relied upon in *Incorporated Oil* were missing and all other facts indicated an intensive effort to conform the picketing with the law, 119 NLRB, at 1639, 1641.

power to make the words "primary" and "secondary" mean "just what [they] choose [them] to mean—neither more nor less"?[9]

Rice Milling and *Denver* foreclose the claim to such power. This Court carefully examined and approved the Board's initial approach to Section 8(b)(4)(A). 341 U.S., at 692. Approval was predicated on the ground that the Board's approach preserved "the union's traditional right to strike" and to picket (341 U.S., at 673, 687), and condemned only secondary boycotts thereby effectuating *both* of Congress' dual objectives. Thus, this Court held not only that the terms "primary" and "secondary" must be defined consistently with their "traditional" content in order to effectuate Congress' objectives in common situs cases, but also that the Board's initial definitions (see our main brief, pp. 39-61), were valid and proper. Short of overruling these decisions outright it cannot now be argued that Congress left at large the content of the terms "primary" and "secondary"; that it intended definition to turn upon the relative value individual Board members would from time to time assign to conflicting interests of management and labor. Drawing the line between these competing interests was Congress' function. It did not abdicate or delegate the function to the Board. *Local 1976, Carpenters Union* v. *N.L.R.B.*, 357 U.S. 93, 99-100; Pet. Br., pp. 37-39, 43-44, 100-103.

The Board's contrary contention hangs entirely upon transforming this Court's commendation of the Board's initial approach into an invitation to reverse it. The Board accomplishes this legerdemain by simply truncating the "dual congressional objectives" passage of *Denver* (Bd. Br., p. 14) to omit the introduction: "In the views of

---

[9] Carroll, *Through the Looking Glass*, Peter Pauper Press, p. 106.

the Board as applied to this case we find conformity with * * *". Having thus eliminated the purpose of the sentence, the Board discerns in the remaining words unbounded authority "to give content to the terms primary and secondary". (Bd. Br., p. 14, n. 3, and accompanying text). And it is on this authority alone that the Board predicates its claim of discretion, to which courts must defer, to declare primary conduct secondary.

Moreover, the Board's reading of this truncated quotation assumes that the "dual Congressional objectives" are in conflict with each other and therefore require "accommodation". (Bd. Br., pp. 14, 50.)[10] This assumption stems from equating the "dual objectives" referred to in *Denver* with the Board's statement in *Moore Dry Dock* that "neither the right of the unions to picket nor the right of the secondary employer to be free from picketing can be absolute". (Bd. Br., pp. 22-23, 27, 29-30, 32-33, 50). However, the equation is completely false. Clearly, between the two so-called rights referred to in *Moore Dry Dock* there is a conflict. To uphold absolute freedom to picket would grant unions a right to engage in secondary picketing. To uphold the neutral's absolute immunity from picketing would deny the right of the union to engage in primary picketing. Necessarily, since both rights cannot coexist, they must be accommodated. However, the "dual objectives" are not these rights. They are not incompatible, inconsistent, or in conflict. The function of the Board under Section 8(b)(4)(A) is to "accommodate" these so-called rights in "conformity" with the dual objectives, as it did in *Denver*, not to "accommodate" Congress' objectives as it seeks to do here.

---

[10] The assumption appears clearly in the quotation from *Gonzales* which appears at pp. 29-30 of the Board's brief.

II. THE BOARD'S REDEFINITION OF "PRIMARY" AND "SECONDARY" CANNOT BE JUSTIFIED UNDER *DENVER* AND *LANGER*.

General Electric, in effect, admits that the Board's duration test is untenable for it argues candidly (GE Br., pp. 32-36) that the content of the Union's right to bring pressure to bear on the primary employer must be the same in all cases. Accordingly, it rests its case on denial that Congress meant to preserve the union's "traditional" right to strike and to picket. The Board, on the other hand, concedes that the "traditional" right to strike and to picket includes the right to influence neutral employees "to withhold their * * * services from the struck employer" (Br. p. 20), but contends that this right does not exist in "common situs" cases.

The unarticulated premise of the Board's argument (Bd. Br., pp. 40-42) is that in *Rice Milling* this Court upheld the union's right deliberately to induce employees of neutrals to boycott the primary employer because that was not a "common situs" case, and denied the same right in *Denver* and *Langer* because they were. Thus, while ostensibly yielding to *Rice Milling*, the Board would emasculate it by excluding "common situs" cases and finding that the regular presence at a primary employer's place of business of neutral employers who there serve him makes a common situs case. But the opinions in *Denver* and *Langer* specifically recognized that in those cases the unions were entitled to exercise the same right which the Court had sustained in *Rice Milling*, 341 U.S., at 687-688, 699-700. *Denver* and *Langer* were differentiated on the ground that the union "*conduct* which the Board here condemned is readily distinguishable from that which it declined to condemn in the *Rice Milling* case" (341 U.S.

at 687), [emphasis supplied], not on the ground that the unions' rights were different.

The Board insists (Bd. Br. pp. 18, 20-21, 23, 24, 36), that under the original approach, the union's right to make "overt appeals" to employees of neutral employers in the absence of employees of primary employer was based on a "geographic" test and was limited to cases where the primary employer owned the picketed premises. But when it comes to illustrating the scope of that right, the Board dares cite only *Interborough News* (Bd. Br., p. 21) and it must ignore *Moore Dry Dock*, for there identical non-picket line inducement of neutral employees was held primary and lawful where the situs of the dispute was located at premises owned by a neutral employer. See Brief for Petitioner, p. 57. As late as November 12, 1959, the Board recognized and applied this aspect of the *Moore Dry Dock* holding, *International Organization of Masters, Mates and Pilots, etc.*, 125 NLRB 113, 114, n. 1, 126. Thus the Board's brief fails completely to come to grips with our demonstration (Pet. Br., pp. 46-61) that under the original approach the legality of the union's conduct depended only on whether it limited its appeal for assistance to denial of services to the primary employer at a situs of dispute, not on whether there happened to be a juxtaposition of employers at the situs.[11] Whether and how long

[11] With one exception, the cases which the Board says are inconsistent with our analysis, p. 36, n. 32, were all decided after the new approach was adopted in 1953. The one exception is *Printing Specialties and Paper Converters Union, Local 388 v. Le Baron*, 9 Cir., 171 F. 2d 331. The Board says that case holds illegal inducement of a refusal to unload the truck of an "ally" of the primary employer. But its own citation, 82 N.L.R.B. at 278, explicitly states that the trucker involved had replaced another independent trucker, not the primary employer's own employees. By the very definition set out elsewhere in the Board's brief (p. 39, see also n. 34, pp. 38-39), the independent trucker in *Pacific Scalright* was not an "ally"

neutral employers were present could not make a diffe ence, for under the initial approach inducement of a boy cott of the primary employer at a common situs, like induce ment of such a boycott at a situs occupied by him alone was deemed to have but a single object—to exert primary not secondary pressure.[12]

The Board argues (Br. pp. 19, 35-36, 38, n. 33) that th distinction between services performed *for* the primar employer and services performed *for* other employer should be disregarded because to the extent that the pri mary employer also benefits from the latter, the result are "artificial" and "unrealistic". But the Board doe not deny that all the courts which rejected the "unity o interest" test held that refusal to purchase the offending parties' goods from the offending party himself was a pri mary boycott while holding that refusal to purchase his goods from an intervening third party was secondary (Cf. Bd. Br., p. 37, with Pet. Br., p. 26.) The presen

---

of the primary employer. See also *Metal Polishers, Buffers, Plater and Helpers (Climax Machinery Company)*, 86 N.L.R.B. 1243, dis cussed in our main brief at p. 48. The refusals to handle American Iron freight in *Local 1976, Carpenters Union* v. *N.L.R.B.*, 357 U.S 93, 96-97, were not limited to times when the freight was located at a situs of the primary dispute; the refusals were a classic produc boycott allegedly immunized only by a "hot cargo" clause. To th extent that the Court of Appeals decisions which the Board cite in note 32 and in note 19, p. 24, adopt the new "incidental" versu "deliberate" inducement approach evolved by the Board after 1954 they are in irreconcilable conflict with the earlier cases and with such subsequent decisions as those cited at p. 89 of our main brief See also Petition for Writ of Certiorari in *International Hod Car riers etc.* v. *N.L.R.B.*, No. 800, this Term, filed March 11, 1961, pp 10-16.

[12] G.E. of course errs in asserting (Br. p. 18) that Petitioner "ad mits that its activities at [gate 3A had] the deliberate object o forcing the contractors to cease doing any business with the struck employer * * *." Petitioner asserts that its sole object was to pre vent G.E. from obtaining the benefit of any work or services at the situs of the dispute and thereby to exert direct pressure on G.E

Solicitor General pointed out in 1959 that this traditional distinction between primary and secondary in the field of purchase boycotts was the one Congress adopted with respect to work and services in Section 8(b)(4).[13]

Moreover, this Court pointed out in *Denver*, 341 U.S., at 688-690, that it is the statutory scheme itself which impels the conclusion that a union can call a strike of electrical workers in a dispute with a general contractor if the electrical work is being done by the general contractor's own employees, but not if it is being done by employees of a subcontractor. Those who suggested that economically such a result is anomalous urged that uniformity be attained by allowing the union to call a strike of electrical workers even if they were employed by an independent contractor. It was never responsibly suggested that uniformity should be achieved by depriving the union of the right to call a strike among electrical workers who are employed by the primary employer. Yet the Board now proposes to eliminate economically "unrealistic" distinctions by curtailing what has always been regarded as primary pressure. If, as this Court held, symmetry is not to be attained by denying to employers engaged on a common project the same protection against secondary boycotts which is enjoyed by employers who do business with the primary employer at a place which is not a situs of the dispute,[14] *a fortiori* it is not to be attained by emasculating the traditional right to picket.

---

[13] Cox, *Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 271 (1959).

[14] That the protection was exactly the same is further shown by comparison of *Metal Polishers (Climax Machinery Co.)*, 86 N.L.R.B. 1243, 1251-1252, discussed in Petitioner's brief, p. 48, with *Chauffeurs, Teamsters, Warehousemen and Helpers, (Hoosier Petroleum Co.)*, 106 N.L.R.B. 629, discussed in the Board's brief, p. 25.

III. THE DURATION TEST IS INCOMPATIBLE WITH SEC TION 8(b)(4)(A)

The Board admits that its new approach makes th union's right to exert pressure upon a primary employe vary inversely with the duration of a neutral employer' business at the situs. Fatal to this approach is its assump tion that if two independent businesses are sufficiently en meshed the Board is entitled to curtail the union's tradi tional right to strike against one in order to immunize the other. The single shred which the Board offers to suppor that assumption (Bd. Br. 33, n. 30)—Senator Taft's state ment that Section 8(b)(4)(A) was intended to protect "the business of a third person who is wholly unconcerned in the disagreement"—is wholly inapposite. Senator Taft made it abundantly plain that the only protection Section 8(b)(4)(A) was intended to offer such a business was protection against "secondary boycotts" which were "unlawful * * * at common law." Br. for Petitioner, p. 24.

Since the duration test admittedly attempts to measure the legality of strike pressure by its effect—*i.e.*, magnitude of injury to the neutral employer (Bd. Br. p. 49)—it is defective for the reasons stated by this Court in *Local 1976, Carpenters Union* v. *N.L.R.B.*, 357 U.S., 93, 98-101. The only evils, regardless of magnitude, which Section 8(b)(4)(A) aims to avert are those produced by the precise type of secondary boycotts which the Act condemns. It is impossible, in such a statute, to equate magnitude of injury with proof of violation.[15]

Unlike the second proviso to Section 8(b)(7)(C) of the

---

[15] *Schauffler* v. *Local 30, Roofers*, D. Del., No. 2286, decided Feb. 10, 1961, 47 L.R.R.M. 2576, 2578, 2580.

new Act,[16] Section 8(b)(4) does not make the legality of picketing turn on its effect, but only on its object. The question under Section 8(b)(4) is whether injury to the neutral employer is an "object" or an "incidental consequence" of strike action; whether the neutral employer is the union's target or merely an incidental victim. Quantum of effect on the neutral employer has no possible relevance to that inquiry. In any event, there is not a scintilla in either the Board's decisions or in its counsel's briefs which purports to demonstrate the existence of any necessary connection between duration and damage or which undertakes to refute our demonstration (Pet. Br., pp. 98-99), that no relationship between them exists. But, if neutral employers who are enmeshed with the primary employer at the situs of a labor dispute suffer more severely from a labor dispute involving the primary employer than other neutrals who are not so enmeshed, the consequence is attributable solely to the difference in degree of enmeshment, not to any difference in the object of the union's conduct.

Moreover, the Board itself concedes that precisely the same effect upon neutral employers who have a regular place of business at a common situs may be produced by lawful primary picketing as by unlawful secondary picketing. Thus the Board admits that a union can lawfully deliberately induce employees of an electrical supply house to refuse to make deliveries to a picketed non-union sub-

[16] That proviso reads: "* * * *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

contractor at a building site, but that it cannot lawfully deliberately induce employees of a carpentry subcontractor to go on strike because of its dispute with the electrical subcontractor. Yet the refusal of deliveries to the electrical subcontractor may tie up the entire project, including the work of the carpentry subcontractor, as completely as a strike of the carpenters. Plainly, a distinction other than effect on the neutral carpentry contractor is required to explain the difference in result in the two cases. Under the *Moore Dry Dock* approach the difference derives from the application of the primary-secondary distinction to the union's conduct; under the Board's view the difference derives solely from the transient nature of delivery service.

The Board says (Bd. Br., pp. 49-50) that its differentiation between different types of neutral employers (e. g., transportation companies on the one hand and building contractors on the other) should not be rejected because "it may be difficult to determine in which category a particular neutral employer falls". But the difficulty lies not in the similarity between different types of employers, it lies in the test itself, which the Board's brief says (Bd. Br., pp. 19, 28, 33, 42, 49), is based on the theory that interests of a neutral employer are entitled to protection only if his employees work at the situs of the dispute "in a continuous and substantial manner".[17] Thus the Board's brief (p. 19, n. 8, p. 41) confirms our charge (Br., p. 98) that the duration test is nothing but a transformation of this Court's finding in *Rice Milling* that picketing of the primary employer at a situs of the dispute is not de-

[17] Indeed, the Board's statement of the test is itself vague. The Board states variously that the test is whether the "neutral employer" (Br., p. 19, 42), "the neutral employees" (Br., p. 19, n. 8, 33, 49) or the "neutral employer and his employees" (Br., p. 28) work at the situs in a substantial and continuous manner.

signed to evoke a stoppage by employees of neutrals elsewhere than at the situs (Br. for Petitioner, pp. 65-66), into a rule of law which makes the object of such picketing turn on whether the employees of neutrals approach the line regularly, or "happen to approach" it sporadically. Since the metamorphosis is wholly arbitrary, application of the distinction predicated upon it must inevitably breed confusion and inconsistency.

Moreover, if the interests of employers who do business regularly at the situs of a labor dispute are entitled to protection at that situs so also are the same interests of employers who do business only intermittently. Plainly, "blanket exclusion of [such] employers as a class is beyond the power of the Board". *Office Employees International Union, Local No. 11, AFL-CIO* v. *N.L.R.B.*, 353 U.S. 313, 318; *Hotel Employees Local No. 225* v. *Leedom*, 358 U.S. 99. Congress would seem to have placed the matter beyond doubt by distinguishing between types of employers in the new Sections 8 (e) and (f), but making no such distinction in Section 8 (b)(4).

Ignoring the *Chenery* rule (*SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-95), Board counsel have invented for this case in this Court (Bd. Br. pp. 32-33), a new finding; *viz.*, that a picket line at the primary employer's premises publicizing a union's dispute with the primary employer may lead employees of neutral employers to believe that their own employer is the target if the neutrals are employed regularly at the situs. But, inasmuch as the neutral employees are being induced to boycott the primary employer only, the picketing cannot possibly constitute a violation. Br. for petitioner, pp. 66, 73-75.[18]

---

[18] Cf. *Rice Milling* and *Ryan* where, because the place of business was that of the primary employer to which neutrals came only to serve him, specific identification of the primary employer on the

The "duration" test makes the distinction between u lawful and lawful inducement of neutrals turn on the exte of the work stoppage by neutral employees which occu when a picket line is respected by those who work reg larly at the picketed situs, on the one hand, and by tho who work there only occasionally, on the other. This di tinction is precluded by the plain terms of the Act. A agree that Congress prohibited "partial no less than tot refusals to work." (Bd. Br., p. 37). Consequently, if i ducement not to serve the primary employer behind picket line is held to have the prohibited object wher the service involved is extensive, it must necessarily b held to have the same prohibited object where the servic involved is transitory or meager. *Per contra*, if, as th Board concedes, refusal to perform services which ar transitory or meager for the primary employer at a situ of the dispute is not an unlawful secondary refusal, the refusal to perform extensive or regular services for hi there cannot be a secondary strike. Because partial n less than total refusals are outlawed, how large or sma a part of the neutral employees' work consists of servin the primary employer can make no legal difference.

---

picket sign was not required (Br. for Petitioner, pp. 50, 63, 66, 73 with *John A. Piezonki, d/b/a Stover Steel Service* v. *N.L.R.B.*, Cir., 219 F. 2d 879, a true common situs case, where such identifica tion was required. See Petition for Writ of Certiorari in *Inter national Hod Carriers, Etc.* v. *N.L.R.B.*, No. 800, this Term, p 12, n. 6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

BENJAMIN C. SIGAL,
EDMOND F. ROVNER,
DAVID S. DAVIDSON,
1126 16th Street, N.W.,
Washington 6, D. C.

MOZART G. RATNER,
1411 K Street, N.W.,
Washington 5, D. C.
Attorneys for Petitioner.

HERBERT L. SEGAL,
403 Republic Building,
Louisville, Kentucky,
Of Counsel

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 10 1961
JAMES R. BROWNING, Clerk

No. 321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioners

VS.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR UNITED STEELWORKERS OF AMERICA AND INTERNATIONAL CHEMICAL WORKERS UNION, AMICI CURIAE

DAVID E. FELLER
JERRY D. ANKER
FELLER, BREDHOFF AND ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

Attorneys for United Steelworkers of America and International Chemical Workers Union.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. The Board's Brief Bears No Relation to the Board's Decision	2
II. The Underlying Error in the Board's Approach	12
III. The Underlying Error in Board Counsel's Approach	17
CONCLUSION	23

TABLE OF CITATIONS

Cases

Brewery Drivers Local 67 (Washington Coca-Cola Bottling Works, Inc.), 107 N.L.R.B. 299 (1953), *enforced*, 220 F. 2d 380 (D. C. Cir. 1955) 16

General Drivers Local 968 (Otis Massey Co.), 109 N.L.R.B. 275 1954), *enforcement denied*, 225 F. 2d 205 (1955), cert. denied, 350 U. S. 914 (1955) 16

International Brotherhood of Teamsters (Alexander Warehouse); 128 N.L.R.B. No. 105, 46 L.R.R.M. 1409 (August 25, 1960) .. 15

International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service), 87 N.L.R.B. 502 (1949) 13

International Organization of Masters, Mates and Pilots, 125 N.L.R.B. 113 (1959) 15

Local 36, Int'l Chemical Workers Union v. N.L.R.B. (Virginia-Carolina Chemical Corp.) (now pending in this Court on petition for Certiorari, this Term, No. 680) 3, 6, 9

Local 618, Automotive Employees, 116 N.L.R.B. 1844 (1956), *reversed*, 249 F. 2d. 332 (8th Cir. 1957) 16

Local Union No. 55 and Carpenter's District Council (PBM), 108 N.L.R.B. 363 (1954), *enforced*, 218 F. 2d 226, 228 (C.A. 10, 1954) 22

Milwaukee Plywood Co. v. N.L.R.B., 47 L.R.R.M. 2291 (7th Cir. Dec. 20, 1960) 16

NLRB v. International B'hd of Electrical Workers, 181 F. 2d 34, (1950), *aff'd*, 341 U. S. 694 (1951) 14

NLRB v. International Union of United Brewery Workers, 272 F. 2d 817 (10th Cir. 1959) 16

NLRB v. Denver Bldg. & Const. Trades Council, 341, U. S. 675 (1951) 14, 20

NLRB v. General Drivers Local 968, 225 F. 2d 205 (5th Cir. 1955) 16

Page

NLRB v. Local 244, Int'l B'hd of Teamsters, 284 F. 2d 887 (2d Cir. 1960) 16

Newspaper and Mail Deliverers' Union (Interborough News Co.), 90 N.L.R.B. 2135 (1950) 13

Oil Workers International Union, Local 346 (The Pure Oil Co.), 84 N.L.R.B. 315 (1949) 13

Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market), 116 N.L.R.B. 856 (1956), *nforced,* 249 F. 2d 591 (C.A. 10, 1957) 19

Sales Drivers Local 859 110 N.L.R.B. 2192 (1954), *reversed,* 229 F. 2d 514 (D. C. Cir. 1955), *cert. denied,* 355 U. S. 972 (1956) 16

Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950) 13, 14

SEC v. Chenery Corp., 318 U. S. 80 (1943) 3

Union De Trabajadores (Gonzales Chemical Industries, Inc.), 128 N.L.R.B. No. 116, 46 L.R.R.M. 1423 (August 26, 1960) .. 11

United Electrical & Machine Workers (Ryan Construction Corp.) 75 N.L.R.B. 417 (1949) 8, 13

United Steelworkers of America (Phelps-Dodge Refining Corp.), 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (March 31, 1960), pending on review in United States Court of Appeals for the Second Circuit, No. 26252 9-11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 321

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioners

VS.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR UNITED STEELWORKERS OF AMERICA AND INTERNATIONAL CHEMICAL WORKERS UNION, AMICI CURIAE

INTRODUCTION

This reply brief is submitted by the United Steelworkers of America and the International Chemical Workers Union, *amici curiae*, with the consent of the parties. Under normal circumstances, a reply brief in this Court by an *amicus curiae* is an exercise in redundancy. Presumably, by the time a case comes to this Court the issues have been so refined before the briefs of the parties have been submitted that the brief of an *amicus curiae* can address itself to the issues presented to the Court.

This case, however, is not an ordinary case. The issue

which was decided by the Board in this case, and to which the opening briefs principally addressed themselves, has largely disappeared. Instead, an entirely new issue has appeared which makes irrelevant almost all that has gone before. Hence this brief.

I. THE BOARD'S BRIEF BEARS NO RELATION TO THE BOARD'S DECISION

What has happened in this case is yet another repetition of a story, old to the practitioners of labor law, which by now should also be familiar to this Court. The Labor Board begins the story by making a decision which reinterprets and applies the statute in an indefensible way. The Board pretends to no expertise or balancing of interests. Instead, it simply decides that a given fact "X", heretofore always regarded as immaterial, equals an unfair labor practice. The Board is then assailed in the courts for its change in doctrine. The case finally reaches this Court. Then, suddenly, and for the first time, we find revealed in the brief submitted for the Board an "expert administrative judgment" [1] based on a balancing of facts which the Board itself had ignored. The Board's conclusion, which up to this point simply relied on its fiat that "X" equals an unfair labor practice, suddenly is transformed by its counsel's learned brief into a reflection of "administrative experience, appreciation of the complexities of the problem . . . and responsible treatment of the . . . facts." [2]

Counsel opposing the Board are then in a most difficult position. The case has been presented to the Board, decided by the Board and argued in the Court of Appeals without reference to the theory so beautifully added afterwards in this Court or to the facts upon which that theory rests. But in this Court every expectation is reversed. The issue

---

[1] Board Brief, p. 50.
[2] Id. p. 51.

which counsel thought was the issue (which—more importantly—the *Board* thought was the issue) is lost in a balancing of factual considerations which, until the General Counsel's brief was filed in this Court, never were relied upon.

Counsel can ignore the change of pace and, treating this Court as if it were the Board, urge that a decision on the ground now asserted is contrary to the statute. Or counsel can cry *"Chenery, Chenery, Chenery,"*[3] and assert—as we do—that what is being passed off as Board expertise is the expertise of the Board's counsel. In either case most of the arguments which counsel for the parties first made, which were directed at what the Board actually decided, are largely irrelevant.[4]

Equally important—at least to these *amici*—is the fact that the rationale created in this Court to justify the Board rests on facts which only appear fortuitously in the record of the particular case, and which are totally absent in other cases decided by the Board on the same basis. As counsel in these other cases, we are truly confounded. We had thought —because the Board had said so—that those cases involved the same issue. The Solicitor General so informed this Court. (See Memorandum for the National Labor Relations Board in No. 680). Yet suddenly it is made to appear that the "lead" case depends on facts heretofore regarded as irrelevant which do not appear in the other cases. Even if counsel for the Board should be successful in palming off their justification for the result in the "lead" case, what is to happen to the others?

We think we know what the answer should be. The Board and its counsel should be told bluntly that the Board's decision must stand or fall on the basis on which the Board decided it. All of the cases decided by the Board on the same

---

[3] *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943).

[4] We do not intend to be critical of counsel for the Board. To the contrary, we are full of admiration. Who would dream that what at least looks like a silk purse could be made out of *that* sow's ear!

basis should be disposed of in the same way. New theories as to how the Act should be applied should be advanced by the General Counsel before the Board, not here, and they should be advanced in cases in which the facts now argued to be determinative can be fully litigated, not cases in which they appear accidentally.

Having said this in general terms, we are obliged, we recognize, to demonstrate that our characterization is accurate. This we shall now proceed to do.

1. *The rationale presented to this Court.* In this Court, counsel for the Board argue that this case is a "common work site" case.[5] It is conceded that the right to picket includes not only the right to appeal to employees of the primary employer, but the right to appeal to third persons—*i.e.*, employees of other employers—to withhold their business or services from the struck employer.[6] There is a right to do this deliberately and intentionally, not merely as an incident to the appeal to those employed directly by the primary employer. But, it is said, where the Board finds that the premises of a struck employer have become the common work site of that employer and a neutral employer, the Board is justified in finding that appeals directed solely to the employees of the neutral are "secondary." This does not mean, it is said, that every industrial plant is a common situs. In order for the rule of this case to come into play, "it must be established . . . that the neutral employer is at the plant for such a long and continuous period that it has in effect become a regular work place for his employees."[7] Once this is established, the argument runs, the Board has the right under the Act to find, as it did in this case, that picketing at a separate gate reserved for the employees of the neutral employer is truly secondary. It may be difficult to draw the fine line between the cases where the plant is a common

[5] Board Brief, p. 19.
[6] Board Brief, p. 20.
[7] Board Brief, p. 50, n. 42.

work site and the cases where it is not, but that is the reason why the Board's expert judgment and its responsible treatment of the facts must be respected.[8]

2. *The Board's rationale.* The astonishing thing about the actual decision of the Board in this case is that the careful distinction which is now urged to be its very foundation had nothing whatsoever to do with it.

The question of whether the case was to be treated as a common work site case was mentioned at the hearing before the Trial Examiner. The General Counsel's position, as reflected in the Examiner's Intermediate Report, however, was that this was *not* a common situs case. His position appeared to the Trial Examiner to be that picketing a struck employer at a separate gate reserved for the employees of other employers constituted, *per se,* a violation of Section 8(b)(4). (R. 29-31).

The Trial Examiner rejected this contention. When the case came to the Board, there was no doubt whatsoever as to its view. The Board reversed the Trial Examiner's conclusions—but none of his factual findings. *All* of the Board's reasoning is contained in the following extract from its opinion:

> "The Trial Examiner found no violation because he was of the opinion that the picketing at gate 3-A was 'traditional' picketing protected by the Act. We disagree.
>
> "We find from the foregoing that only the independent contractors' employees were permitted to use gate 3-A, and that the Respondent was aware of this fact. We find also that the Respondent's object in picketing at gate 3-A was to enmesh these employees of the neutral employers in its dispute with the Company. Such purpose is shown not only by the picketing at gate 3-A but also by the oral appeals to the employees of neutrals not to cross the picket line.

[8] Board Brief, pp. 49-51.

> "Accordingly, in view of the foregoing, and upon the record as a whole, we find that the Respondent violated Section 8(b)(4)(A) of the Act by inducing and encouraging the employees of independent contractors to engage in a concerted refusal to work with an object of forcing the independent contractors to cease doing business with the Company." (R. 42)

The finding which we are now told is critical—that the General Electric premises had become the "regular work place" of the contractor's employees—was not made at all. The simple basis for the Board's decision was that the object of the picketing at the separate contractors gate "was to enmesh these employees of the neutral employers. . . ."

If there were any doubt that this was the basis for the Board's decision, that doubt certainly would be resolved by Member Fanning's concurrence. Unlike the other members of the Board, he was not prepared to say that *"separate gate* equals *enmeshing other employees* equals *secondary boycott."* He alone argued that the Board should interdict the picketing because this was a case to which the "common situs" rules should apply.

3. *The subsequent cases.* That the Board's doctrine was a "separate gate" doctrine *per se* and was wholly unrelated to whether the plant premises had become established as the "common working place" for two employers was quickly demonstrated in subsequent cases.

The first of these was the *Virginia-Carolina Chemical Corp.* case, involving the International Chemical Workers, which is now pending on petition for certiorari in this Court as No. 680, and which the Solicitor General has assured this Court "presents the same issue" as the instant case.[9]

In *Virginia-Carolina* the Union went on strike against the Virginia-Carolina Chemical Corporation on May 22, 1959.

---

[9] Memorandum for the National Labor Relations Board, *Local 36, International Chemical Workers Union* v. *NLRB*, No. 680, p. 1.

On June 1, 1959—nine days after the strike began—the company executed an agreement with the Wellman-Lord Engineering, Inc., a construction company, for the installation of certain equipment on the plant premises. It began to construct a fence around the property. On June 12, a short four days after the Board's decision in the *General Electric* case, Virginia-Carolina announced that one gate in this fence would be established for the exclusive use of Wellman-Lord employees. When the union, which had been picketing the entire plant, continued to do so and none of the Wellman-Lord employees would cross the picket line, unfair labor practice charges were filed on the basis of the Board's decision in the *General Electric* case.[10]

The contentions of the parties in the *Virginia-Carolina* case are set forth clearly in the Trial Examiner's Report:

> "Relying principally on the recent *General Electric* case, the General Counsel and V-C contend that Local 36 has violated Section 8(b)(4)(A), of the Act by picketing at an entrance way which, with the knowledge of Local 36, had been set aside for the exclusive use of Wellman's and other independent contractor's employees . . .
>
> "Local 36 would distinguish the *General Electric* case from the instant situation in that, unlike the present situation, the separate contractor's gate in the *General Electric* case was established long before the labor dispute arose and picketing activities began. To extend the *General Electric* case to the present situation, contends Local 36, would in effect permit a primary employer by his 'self-serving act' to convert otherwise lawful picketing into unlawful secondary activity. The theory of the *General Electric* case seems to be, however, that a primary employer may withdraw a portion

[10] The facts are set forth in the Trial Examiner's Intermediate Report which is reproduced in the Joint Appendix in No. 680 at pp. 251-263.

> of his own premises from the primary situs category and thus delimit the geographical scope of otherwise proper picketing, and I fail to see that the timing of such withdrawal, be it before or after picketing, is material. Local 36's basic disagreement would appear to be with the *General Electric* case itself."[11]

The issue, thus squarely drawn, obviously had not the slightest reference to the question of whether the premises of Virginia-Carolina had become the "regular working place" for Wellman-Lord employees for the simple reason that none of those employees had begun to work when the picketing took place. Only after the Board, relying on the *General Electric* case, had obtained an injunction against the picketing did the Wellman-Lord work begin.

How then did the Board apply what its counsel now say is the critical consideration? It didn't. It simply applied its *General Electric* rule, explicitly overruled the *Ryan Construction Corp.* case[12] and found the union guilty of violating the Act.[13]

The union sought review in the Court of Appeals for the District of Columbia. It urged, in its brief, that the fact that the gate for the contractor's employees had not been established before the strike began distinguished the case from the *General Electric* case. The Board disagreed. The *General Electric* case, it said "is dispositive of the principal issue in this case—whether picketing a separate gate of an employer's premises reserved for the use of independent contractors working at those premises violates Section 8(b)(4)(A)."[14] When did the picketing which had been primary

---

[11] Id. at pp. 256-257.

[12] *United Electrical & Machine Workers (Ryan Construction Corp.)* 85 N.L.R.B. 417.

[13] Joint Appendix, No. 680, p. 268.

[14] Brief for the National Labor Relations Board, *Local 36, Int'l Chemical Workers* v. *NLRB,* United States Court of Appeals for the District of Columbia Circuit, No. 15631, p. 7.

become secondary? "The moment employees of a neutral employer began, or attempted to begin, working there."[15]

Concluding from the Board's brief that the issues were the same in the *Virginia-Carolina* case as in the *General Electric* case, counsel so stipulated, the Court ordered the Board's order enforced and a petition for certiorari was filed in this Court. *Local 36, Int'l Chemical Workers Union, AFL-CIO* v. *NLRB,* No. 680, this Term. The Solicitor General in response to the petition for certiorari asserted to this Court that the case "presents the same issue as is involved in *Local 761, Int'l Union of Electrical Workers v. NLRB,* No. 321."[16] This Court is presumably holding the petition for certiorari for disposition on the basis of its decision in the present case. But nowhere in the *Virginia-Carolina* case, from the hearing before the Trial Examiner, through the Board and the briefs presented to the Court of Appeals, and finally in this Court, has it even been suggested that the primary employer's premises had become the "regular working place" of the contractor's employees.

The next case to come along involved a strike at the Phelps-Dodge Refining Corporation by the United Steelworkers of America. In that case the company in July of 1959 cut a new opening in the fence surrounding its plant in anticipation of a strike which began on August 3, 1959. When the striking union picketed that gate, as well as the other gates, unfair labor practice proceedings were begun in reliance upon the Board's decision in the *General Electric* case. The General Counsel's contention, as set forth by the Trial Examiner in the *Phelps-Dodge* case, was as follows:

> "The General Counsel contends that the case at bar is similar in all respects to the *General Electric* case where the Board held that a union violated Section 8 (b) (4) (A) by picketing an employer's plant gate that

---

[15] *Id.* at p. 11.

[16] Memorandum for the NLRB, No. 680, p. 1.

was used exclusively by employees of independent contractors who had construction contracts with the employers." [17]

The union's contention was described and disposed of by the Trial Examiner in the following language:

> "The Respondent's contention that the *General Electric* case can be distinguished from the instant situation in that in *General Electric,* the contractor's gate had been in existence for over 4 years while in the case at bar, the contractors' gate was built a few days before the strike, is not a substantive distinction. It is a distinction without a difference because the controlling factor in this proceeding is the Respondent's knowledge, prior to the strike, that such a gate had been constructed and opened under extensive safeguards to insure its exclusive use by contractors and their employees." [18]

The question of whether the contractor's employees had been in the plant for a long and continuous period was nowhere adverted to by the Trial Examiner. Indeed, as the foregoing suggests, he would have regarded the period of the contractor's employment as relating to "a distinction without a difference."

The Trial Examiner decided the case simply on the basis that the Board had concluded in *General Electric* that picketing at a contractor's gate constituted a secondary boycott. The Board affirmed the Trial Examiner's ruling without comment and without any finding as to how long the contractor's employees had worked at the plant before the strike and the picketing. *United Steelworkers of America (Phelps-Dodge Refining Corp.),* 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474.

Review was sought in the Court of Appeals for the Second

---

[17] 126 N.L.R.B. No. 168, Joint Appendix, *United Steelworkers of America* v. *NLRB,* United States Court of Appeals for the Second Circuit, No. 26252, p. 76.

[18] Id. at 87.

Circuit and the case is now pending there after argument.[19] The Board's decision, as described by its counsel in that case, was simply that the union "by picketing at gate F, knowing that the gate was reserved for the exclusive use of the contractors and their employees, induced and encouraged the employees of these neutral employers in order to force the independent contractors to cease doing business with the Company."[20] The case, therefore, the Board contended was "indistinguishable in all pertinent respects" from the instant case.[21] Yet not a word was said about whether the Phelps-Dodge premises had become the "regular working place" of the contractors' employees.[22]

---

[19] *United Steelworkers of America* v. *NLRB*, No. 26252.

[20] *Id*, Brief for the National Labor Relations Board, p. 7.

[21] *Id*. at p. 13.

[22] One of the unfortunate hazards of supporting the Board's position before the courts (in addition to the difficulty that the position may be unsupportable) is that the Board's position is unpredictable. Thus in the *Phelps-Dodge* case the union argued that if picketing at a separate gate constitutes a violation of Section 8(b)(4)(A), then the same decision should follow even in the absence of a separate gate. Counsel for the Board replied in the following language:

> "Petitioners suggest (Br. p. 15) that the Board's decision here, and in cases such as *Local 761*, would have to be the same even had there been no contractors' gate, and picketing took place at gates used by all persons entering the premises, including employees of the primary employer and of neutral employers. This 'reductio ad absurdum' argument is manifestly without merit." (Board Brief, pp. 22-23).

Unfortunately for Board counsel the Board approved just this "reductio ad absurdum" at almost the same time that counsel submitted their brief to the Court of Appeals for the Second Circuit. *Union De Trabajadores (Gonzales Chemical Industries, Inc.)*, 128 N.L.R.B. No. 116, 46 L.R.R.M. 1423 (August 26, 1960). In that case, in which the separate gate rationale was obviously unavailable, the Board for the first time suggested that picketing a struck plant might be unlawful if it induced the employees of contractors who were "engaged in work for a relatively extended period of time" on the premises not to cross. That reasoning, be it noted, appeared a year and a half after the *General Electric* case and was not related by the Board in any way to the *General Electric* case. It was applied only because the factual basis for the *General Electric* rule—the separate gate—did not exist.

As must be overwhelmingly apparent at this point, the Board's decision in the present case and in the two pending cases in which these *amici* are involved were totally unrelated to the fine-spun theory now presented to the Court. This, in itself, should be sufficient to end the matter. Neither we, nor the petitioner in this case, should be obliged to go further and point out the errors in the approach which is now offered in order to justify the Board decisions. Failure to comment on the Board's present theory, however, might be taken as at least an indication that it is arguably correct. Hence we shall discuss it, briefly. Before doing so, we think it appropriate to discuss, also briefly, what we regard to be the underlying error in the Board's approach which led it to the position which its counsel have now abandoned.

II. THE UNDERLYING ERROR IN THE BOARD'S APPROACH.

This case, and the two other "separate gate" cases now pending, are but symptoms of a disease—the end product of a basic misconception which has found expression in many other cases. It is important, we think, to identify that misconception and indicate the various ways in which it had led the Board into totally uncalled-for applications of the Act.

The basic misconception is simply that Congress intended by Section 8(b)(4) to say that, when a union strikes, the only legitimate function of its picket line is to persuade the employees of the struck employer not to work. Picketing which induces third persons to withhold their business or services from the struck employer is legitimate, in this view, only if it is an unavoidable incidental to this primary function of the picket line. Otherwise, it is an unnecessary enmeshment of neutrals—a "secondary boycott."

This was not the view of the Board which first interpreted the Act. In a host of cases decided between 1949 and 1954

—*Pure Oil*,[23] *Shultz Refrigerated Service*,[24] *Ryan Construction*,[25] *Interborough News*,[26] and *Moore Dry Dock*[27]—the Board made clear what its counsel now acknowledge in this Court: that the right to picket includes the right "to influence third persons to withhold their business or services from the struck employer." What was prohibited by Section 8 (b)(4) was not pressure against the struck employer through the direct loss of business or services performed for him, whether by his employees or by others, but secondary pressure—pressure against a third person, exerted by withholding services from him, to induce him to decide to cease doing business with the struck employer. The question was at which employer was the pressure being directed by the action in question, not whether the persons being induced were technically his employees. When the primary employer conducted his business or part of it at another employer's premises the answer to that question became difficult, and rules had to be developed in those situations to limit picketing to the allowable pressure on the primary employer, but the principle was never in doubt.

Thus where the primary employer's business consisted of making deliveries at retail stores it was permissible to picket trucks while making deliveries at the store in an effort to induce store employees not to accept the merchandise when it was delivered. This was primary since it was directed at the primary employer's business.[28] But picketing to induce

---

[23] *Oil Workers International Union, Local 346 (The Pure Oil Co.)*, 84 N.L.R.B. 315 (1949).

[24] *International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 N.L.R.B. 502.

[25] *United Electrical Workers, Local 813 (Ryan Construction Corp.)*, 85 N.L.R.B. 417 (1949).

[26] *Newspaper and Mail Deliverers' Union (Interborough News Co.)*, 90 N.L.R.B. 2135 (1950).

[27] *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950).

[28] *International B'hd of Teamsters (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502 (1949).

the store employees not to perform services for their employer so that he, in turn, would be forced or required to stop doing business with the primary employer was secondary.[29] To confine picketing to its permitted functions, in these and similar situations, the *Moore Dry Dock* rules were devised.

The *Denver Building Trades*[30] case, which was decided by the Board in 1949 and by this Court in 1951, was completely consistent with this basic approach. In the *Denver* case the union struck against a general contractor in pursuit of its demand that an electrical sub-contractor, who was non-union, be removed from the construction job. The object of the action was to force or require the general contractor to cease doing business with the electrical sub-contractor. If these two employers could be regarded as separate enterprises, the action by the union was clearly secondary. The only argument in the *Denver Building Trades* case was as to whether the nature of the construction industry was not such that the various sub-contractors should be regarded as being engaged in a joint enterprise with the contractor. The dissenters in *Denver,* the unanimous opinion of the Court of Appeals for the District of Columbia Circuit which was reversed in *Denver,* and the dissent in *NLRB* v. *International B'hd of Electrical Workers* in the Second Circuit,[31] argued that a building project should be treated in the same way as an industrial plant so that a dispute dealing with any part of the work being done on the project should be treated just as a dispute dealing with any part of the work in an industrial plant. A majority of this Court decided otherwise. In so doing, however, the Court expressly acknowledged that picketing to persuade employees of customers, as in *Rice Milling,* not to enter the struck plant was "traditional and permissible

---

[29] See *Id.* at 508 n. 14.

[30] *NLRB* v. *Denver Bldg. & Const. Trades Council,* 341 U. S. 675 (1951).

[31] 181 F. 2d 34, 40 (1950), *aff'd* 341 U. S. 694 (1951).

in a primary strike. The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill. It did not commit any unfair labor practice proscribed by Section 8(b)(4)." 341 U. S. 675, at 689-690.

This explanation in the *Denver* opinion served to fortify rather than disturb the Board's general position that conduct by which customers, or suppliers, or other persons, were persuaded not to enter a struck plant was lawful as traditional and permissible primary strike activity. And, as the briefs already submitted to the Court show beyond question, that position was wholly in accord with the statutory purpose.

Beginning in 1954, however, shortly after a new majority was appointed, the Board began to change its view. This change had nothing to do with the *Denver Building Trades* case or with common or roving situs cases—although the rules in those cases, as in others, were affected by it. The change was far more significant and based on a not-quite-acknowledged reversal of the basic premise of the earlier cases: that picketers had the right to appeal to third persons not to continue to perform services for the struck employer at his place of business. Where the picket line also, either actually or theoretically, served the purpose of appealing to the employees whom the union sought to call on strike, then the effect on others was regarded as an undesirable but inevitable incident. But as situations turned up in which, for one reason or another, the picket line could not be justified on this basis, the Board, without ever completely articulating the fact that it was shifting its position, began to find the picketing unlawful. It was not consistent in so doing—see *International Brotherhood of Teamsters (Alexander Warehouse)*, 128 N.L.R.B. No. 105, 46 LRRM 1409; *International Organization of Masters, Mates and Pilots*, 25 N.L.R.B. 113, 126—but the trend was plainly apparent.

So, if the primary employer withdrew his employees from

the premises, the picket line which then served only to induce others not to enter the struck premises became secondary.[32] Or, in the roving situs case, if there was a place where the picketers could appeal to the primary employer's employees, then the trucks could not be followed.[33] And, finally, if there were a separate gate through which only employees of contractors passed to work on the primary employer's plant, then obviously picketing at that gate was not essential to maintain the solidarity of the strikers.

The results involved no balancing of factors, no appreciation of complexities, no responsible treatment of the facts. They followed simply and directly from the Board's premise —a simplicity and directness which is admirably illustrated by the Board's opinion in this case and the other two "reserved gate" cases.

Counsel for the Board have now acknowledged what almost all of the courts of appeal have held when faced with this new premise—that it is simply erroneous.[34] They have jettisoned, and properly, the Board's premise. The fact that they have done so, however, should not camouflage the undeniable fact that it is this premise which is the source of the disease. This case is not just an isolated instance of error, but part of an entire course of erroneous decision. If

---

[32] *Local 618, Automotive Employees,* 116 N.L.R.B. 1844 (1956), *reversed,* 249 F. 2d 332 (8th Cir. 1957).

[33] *Brewery Drivers Local 67 (Washington Coca-Cola Bottling Works, Inc.),* 107 N.L.R.B. 299 (1953), *affirmed,* 220 F. 2d 380 (D. C. Cir. 1955); *Sales Drivers Local 859,* 110 N.L.R.B. 2192 (1954), *reversed,* 229 F. 2d 514 (D. C. Cir. 1955), *cert. denied,* 350 U. S. 914 (1956); *General Drivers Local 968 (Otis Massey Co.),* 109 N.L.R.B. 275 (1954), *enforcement denied,* 225 F. 2d 205 (1955).

[34] *Sales Drivers Local 859* v. *NLRB,* 229 F. 2d 514 (D.C. Cir. 1955), *cert. denied,* 350 U. S. 914; *NLRB* v. *General Drivers Local 968,* 225 F. 2d 205 (5th Cir. 1955), *cert. denied,* 350 U. S. 914 (1956); *Local 618, Automotive Employees* v. *NLRB,* 249 F. 2d 332 (8th Cir. 1957); *NLRB* v. *Local 244, Int'l B'hd of Teamsters,* 284 F. 2d 887 (2d Cir. 1960); *NLRB* v. *International Union of United Brewery Workers,* 272 F. 2d 817 (10th Cir. 1959); *Milwaukee Plywood Co.* v. *NLRB,* 47 L.R.R.M. 2291 (7th Cir. Dec. 20, 1960).

the Court is to deal with what the Board decided here, it should identify and destroy the disease, not merely reverse the symptom.

III. THE UNDERLYING ERROR IN BOARD COUNSEL'S APPROACH

The reasoning in the Board's brief does not, as we have said, rest on the same basis as the Board's decision. This new reasoning can, perhaps, be best characterized by an example. If a plumber approaches a struck plant a picket may seek to induce him not to go in—even though no employees use the gate and the picketing has no other purpose —if the plumber is coming to do a short job like fixing the toilet. But if the plumber is coming to work on a big job in the plant, like installing an entirely new sanitation system, then the inducement is "secondary" and forbidden by the Act. In short, the more intimately and permanently the plumber's employer (or any other concern performing services for the struck plant) is connected with the struck enterprise, the more "secondary" the boycott.

This result, of course, confounds reason. It is based on two false premises: (1) that the duration of the contact between a neutral employer's workers and an industrial plant measures the severity of the damage to that employer if their access to the plant is interrupted; and (2) that the severity of damage to a neutral as the result of his employees' refusal to enter a struck plant is the determinant of whether the action causing the damage is "primary" or "secondary."

As to the first premise, the Board's brief assumes that an employer whose employees perform work in a struck plant for only a short time will be relatively undamaged if they are persuaded not to enter, while the stoppage of work on a construction project covering a longer period of time necessarily must seriously damage the construction contractor. There is no reason to believe that this is so. A contractor's

job at a struck plant, whatever its duration, may constitute only a minor fraction of his total business. He may easily be able to withdraw his employees from the struck premises and put them to work elsewhere with no consequent loss to him except inconvenience.

On the other hand, an employer whose employees are on the struck premises only briefly may be much more drastically affected by their refusal to cross the picket line. A carrier whose sole or principal business is the delivery of materials to a struck plant or the receipt of materials from that plant may be totally put out of business if his employees refuse to cross a picket line, even if they would ordinarily spend little time at the plant. Yet the Board's brief argues that the degree of involvement in the first case is much greater than in the second, and, on this basis, justifies the judgment that the inducement in the first case is "secondary", and in the second case "primary." [35]

This leads to consideration of the second premise—that the severity of damage to the neutral determines whether the action causing the damage is "primary" or "secondary." This is plainly not true and, indeed, begs the question. Secondary action violates the Act, even though the damage to the secondary employer may be small indeed. Primary action is plainly permissible, even though neutrals may be severely damaged by it. A supplier who ordinarily sells all of his products to a struck plant, or a distributor or retailer who is wholly dependent upon the plant's products, may be quite severely damaged by a strike at the plant. But the strike is not thereby converted to a secondary strike, nor is

---

[35] The Board's brief contains a further false assumption: that the fact that a construction project is of long duration means that the project has become the "regular working place" of the employees of the contractor. This is often not the case. Even on a construction project of very long duration individual employees may work only very short periods on the premises when the stage of construction calling for their particular skills is in progress. Indeed, this, rather than the converse, is the normal situation in building construction.

picketing directed to the employees of a struck plant converted to secondary picketing. Any attempt to divide that which is secondary from that which is primary by the extent of the damage presumably suffered by a neutral employer is the pursuit of a will-o'-the-wisp.

The crucial error made by counsel for the Board is to analogize a firm which has contracted to do work for the primary employer on his premises to an independent concern which simply leases space from the primary employer. *Cf. Retail Fruit & Vegetable Clerks Union (Crystal Palace Market),* 116 N.L.R.B. 856 which was enforced, without approval of its reasoning, in *Retail Fruit & Vegetable Clerks Union* v. *NLRB,* 249 F. 2d 591 (C.A. 10, 1957). In the latter situation the two employers conduct independent businesses. An appeal to the employees of the employer not involved in the labor dispute can affect the dispute only insofar as they require the independent employer to cease doing business with the primary employer. This is the evil which Congress intended to prevent.

On the other hand, in the situation presented here the work which is being done, while it is being done by an independent contractor, is being done for the benefit of and as part of the business of the employer with which the union has a dispute. The inducement of the employees of the contractor not to work on the struck premises places pressure directly upon the employer with whom the union has a dispute by depriving him of the benefit of the construction work which he has contracted to have performed on his premises. The contractor may himself be totally indifferent. It may be totally immaterial to him whether he completes his construction contract, or takes his men and works elsewhere. The picketing accomplishes its objection without any intervention on the part of the construction employer and without any consideration as to its effect upon him. He is not asked to assert pressure on the primary employer to grant the union's demands. The pressure is on the primary

employer and it is exerted, simply, by preventing him from having the work on his premises completed—by inducing, in other words, a total cessation of services for the employer, whether by his employees or others.

The difference between a true shared premises case and the present case is the nature of the relationship between the two employers. This, in turn, brings us back to the *Denver Building Trades* case, 341 U.S. 675.

The reliance which counsel for the Board placed upon the *Denver* case is wholly misplaced. *Denver* was decided initially by the same Board which decided *Ryan Construction* and *Moore Dry Dock*. The actual holding of the Board, and of this Court in upholding the Board, is entirely consistent with our analysis and wholly inconsistent with the use which is not sought to be made of that case.

In *Denver* the Building Trades Council had a dispute with a non-union electrical sub-contractor. A general contractor subcontracted part of the work on a construction project to this electrical contractor. The Council called a strike against the general contractor in an effort to force him to remove the sub-contractor from the premises. The employees of the general contractor, and of the other sub-contractors who were also induced to stop working, were not performing any work for the electrical sub-contractor or beneficial to him. To the contrary, he was working for the general contractor and the purpose and effect of the stoppage of work was to force or require the general contractor to stop doing business with the electrical contractor, i.e., to apply secondary, not primary, pressure.

The union's basic argument in *Denver* was that a construction project should be treated in the same way as an industrial plant and the various employers should be regarded, not as separate employers, but as joint participants in one building venture. The union's dispute, it was said, was with the general contractor's refusal to agree that the whole project should be union. It was this argument which

supplied the basis for the dissent in this Court and for the opinion of the Court of Appeals for the District of Columbia Circuit which was reversed by this Court. It is this argument which has supported the persistent and bi-partisan legislative efforts through the years to reverse the rule of the *Denver* case.

A majority of this Court held that the various contractors and sub-contractors on the building project should be treated as separate employers and that, no matter how phrased, the basic dispute was with the electrical sub-contractor. Once this was decided, the result in *Denver* followed as a matter of course.

But that result has, almost literally, nothing to do with this case. If we wish to make an analogy between this case and *Denver* we would deem General Electric here to be in the position of a general contractor, with the construction contractors in the same position as the electrical sub-contractor in *Denver*. The true parallel to *Denver*, if the analogy is pursued, would occur if there were a dispute between the construction workers and their employers, and the construction workers sought to picket the entire General Electric plant in order to induce General Electric to throw the contractors out. This would concededly, violate Sec. 8(b)(4)(A) irrespective of *Denver*—stopping the manufacture of appliances would be effective in the construction workers' dispute only through the pressure on a secondary employer, General Electric.

The only construction project case which would be similar to the present case would be the converse of the *Denver* case: Where there is a strike against a general contractor relating to his employees' wages and the union seeks to put pressure upon him by persuading the employees of a sub-contractor not to work on the struck project. In such a case *Denver* holds that the two employers are not to be considered as one industrial employer but as if they were separate employers in an industrial plant. But it does not fol-

low that the activity is secondary. To the contrary, if the general contractor is treated as if he were the operator of a business on the construction site, and the employees of the sub-contractors as if they were persons coming on his premises to do work which he has contracted for, the activity is plainly primary. On such an analogy the union could not strike the sub-contractor. It could, however, persuade the employees of subcontractors not to come on the site of the dispute and perform their work there because the effect of such action would be the denial of that work to the general contractor, not any inter-employer pressure.

It is argued, in the Board's brief, that in *PBM* the Board applied the *Denver* rule to find a violation of 8(b)(4)(A) in this converse case. *Local Union No. 55 and Carpenters' District Council (PBM), 108 N.L.R.B. 363 (1954).* But this decision was rendered by the "new" Board and over the dissent of the remaining old members and represented not an application of the *Denver* rule but a radical change in the thinking of the Board from the theory expressed in *Denver.* And the Board's order was sustained by the 10th Circuit only because the evidence clearly showed that, in addition to picketing the site at which the general contractor was building, the union threatened the sub-contractors that their employees would be disciplined and that they would be placed on unfair lists and deprived of employees if they did not cease work on the premises. *NLRB* v. *Local Union No. 55, 218 F. 2d 226, 228 (C.A. 10, 1954).* All of these factors clearly showed that the picketing was not directed simply at the work on the job but at the subcontractors generally.

But, passing the fact that the *PBM* case is clearly distinguishable, if it be assumed that the Board in that case regarded *Denver* as holding that workers cannot be persuaded not to perform work on a struck construction project, irrespective of which employer the union has a dispute with, it can only have done so on the premise that, because

of *Denver,* a construction project and a manufacturing plant are not to be treated alike and that inducements directed to the employees of separate employers which would be regarded as traditional primary activity in an industrial plant are to be treated as secondary on a construction project.

This Court, of course, held no such thing in *Denver.* What it held was that action against a separate employer on a construction project should be treated just like action against a separate employer in an industrial plant. It is, therefore, doubly fallacious to argue from the *Denver* case that the picketing here constituted "secondary" activity. The conclusion is false, first, because *Denver* did not hold that analogous activity on a construction project would be secondary. It is false, second, because even if *Denver* be regarded as so holding, this could only be because of an assumed difference between the relationship of general contractor to sub-contractor on a construction project and the relationship of a manufacturer and his contractors in an industrial plant. However adroitly put, the argument defeats itself. It asks, in effect, that this Court come to the *Denver* result by denying the very premise upon which *Denver* rested.

The plain fact is that the *Denver* case has nothing to do with this case. The rule applied by the Board did not rely on *Denver,* was not developed from *Denver* and represents, indeed, a radical departure from *Denver,* whether applied to an industrial plant or a construction project.

CONCLUSION

We have shown, we believe: (1) that the reasoning offered by counsel for the Board before this Court is not the reasoning, and indeed contradicts the basis upon which the Board decided this case; (2) that the Board's decision was based on a fundamental and pervasive error in the application of the statute; and (3) that the new, and contradic-

tory reasoning offered by Board counsel, will not withstand critical examination. For all of these reasons, the judgment of the court of appeals enforcing the Board's order should be reversed.

Respectfully submitted,

DAVID E. FELLER
JERRY D. ANKER
FELLER, BREDHOFF, AND ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

Attorneys for United Steelworkers of America and International Chemical Workers Union.

SUPREME COURT OF THE UNITED STATES

No. 321.—October Term, 1960.

Local 761, International Union of Electrical, Radio and Machine Workers, AFL–CIO, Petitioner, *v.* National Labor Relations Board, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1961.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Local 761 of the International Union of Electrical, Radio and Machine Workers, AFL–CIO was charged with a violation of § 8 (b)(4)(A) of the Taft-Hartley Act, 61 Stat. 136, 141, upon the following facts.

General Electric Corporation operates a plant outside of Louisville, Kentucky, where it manufactures washers, dryers, and other electrical household appliances. The square-shaped, thousand-acre, unfenced plant is known as Appliance Park. A large drainage ditch makes ingress and egress impossible except over five roadways across culverts, designated as gates.

Since 1954, General Electric sought to confine the employees of independent contractors, described hereafter, who work on the premises of the Park, to the use of Gate 3–A and confine its use to them. The undisputed reason for doing so was to insulate General Electric employees from the frequent labor disputes in which the contractors were involved. Gate 3–A is 550 feet away from the nearest entrance available for General Electric employees, suppliers, and deliverymen. Although anyone can pass the gate without challenge,[1] the

[1] During the strike in question a guard was stationed at the gate.

roadway leads to a guardhouse where identification must be presented. Vehicle stickers of various shapes and colors enable a guard to check on sight whether a vehicle is authorized to use Gate 3-A. Since January 1958, a prominent sign has been posted at the gate which states: "GATE 3-A FOR EMPLOYEES OF CONTRACTORS ONLY—G. E. EMPLOYEES USE OTHER GATES." On rare occasions, it appears, a General Electric employee was allowed to pass the guardhouse, but such occurrence was in violation of company instructions. There was no proof of any unauthorized attempts to pass the gate during the strike in question.

The independent contractors are utilized for a great variety of tasks on the Appliance Park premises. Some do construction work on new buildings; some install and repair ventilation and heating equipment; some engage in retooling and rearranging operations necessary to the manufacture of new models; others do "general maintenance work." These services are contracted to outside employers either because the company's employees lack the necessary skill or manpower, or because the work can be done more economically by independent contractors. The latter reason determined the contracting of maintenance work for which the Central Maintenance department of the company bid competitively with the contractors. While some of the work done by these contractors had on occasion been previously performed by Central Maintenance, the findings do not disclose the number of employees of independent contractors who were performing these routine maintenance services, as compared with those who were doing specialized work of a capital-improvement nature.

The Union, petitioner here, is the certified bargaining representative for the production and maintenance workers who constitute approximately 7,600 of the 10,500 employees of General Electric at Appliance Park. On

July 27, 1958, the Union called a strike because of 24 unsettled grievances with the company. Picketing occurred at all the gates, including Gate 3–A, and continued until August 9 when an injunction was issued by a Federal District Court. The signs carried by the pickets at all gates read: "LOCAL 761 ON STRIKE G. E. UNFAIR." Because of the picketing, almost all of the employees of independent contractors refused to enter the company premises.

Neither the legality of the strike or of the picketing at any of the gates except 3–A is in dispute, nor that the picketing was other than peaceful in nature. The sole claim was that the picketing before the gate exclusively used by employees of independent contractors was conduct proscribed by § 8 (b)(4)(A).

The Trial Examiner recommended that the Board dismiss the complaint. He concluded that the limitations on picketing which the Board had prescribed in so-called "common situs" cases were not applicable to the situation before him, in that the picketing at Gate 3–A represented traditional primary action which necessarily had a secondary effect of inconveniencing those who did business with the struck employer. He reasoned that if a primary employer could limit the area of picketing around his own premises by constructing a separate gate for employees of independent contractors, such a device could also be used to isolate employees of his suppliers and customers, and that such action could not relevantly be distinguished from oral appeals made to secondary employees not to cross a picket line where only a single gate existed.

The Board rejected the Trial Examiner's conclusion. 123 N. L. R. B. 1547. It held that since only the employees of the independent contractors were allowed to use Gate 3–A, the Union's object in picketing there was "to enmesh these employees of the neutral employers in

its dispute with the Company" thereby constituting a violation of § 8 (b)(4)(A) because the independent employees were encouraged to engage in a concerted refusal to work "with an object of forcing the independent contractors to cease doing business with the Company." [2]

The Court of Appeals for the District of Columbia granted enforcement of the Board's order, 278 F. 2d 282. Although noting that a fine line was being drawn, it concluded that the Board was correct in finding that the objective of the Gate 3–A picketing was to encourage the independent-contractor employees to engage in a concerted refusal to perform services for their employers in order to bring pressure on General Electric. Since the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification, we brought the case here, 364 U. S. 869.

I.

Section 8 (b)(4)(A) of the National Labor Relations Act provides that it shall be an unfair labor practice for a labor organization

> ". . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requir-

[2] Member Fanning concurred in the result, reasoning that the common-situs criteria set out by the Board in *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N. L. R. B. 547, could be applied to situations where the primary employer owned the premises, and that the requirement that the picketing take place reasonably close to the situs of the labor dispute had therefore been violated by the picketing around Gate 3–A.

> ing . . . any employer or other person . . . to cease doing business with any other person. . . ."

This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity. "While § 8 (b)(4) does not expressly mention 'primary' or 'secondary' disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's 'secondary boycott sections.'" *Labor Board* v. *Denver Building Council*, 341 U. S. 675, 686. "Congress did not seek, by § 8 (b)(4), to interfere with the ordinary strike . . . ." *Labor Board* v. *International Rice Milling Co.*, 341 U. S. 665, 672. The impact of the section was directed toward what is known as the secondary boycott whose "sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *International Brotherhood of Electrical Workers* v. *Labor Board*, 181 F. 2d 34, 37. Thus the section "left a striking labor organization free to use persuasion, including picketing, not only on the primary employer and his employees but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer and persons dealing with them . . . and even employees of secondary employers so long as the labor organization did not . . . 'induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment' . . . ." *Labor Board* v. *Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887, 889.

But not all so-called secondary boycotts were outlawed in § 8 (b)(4)(A). "The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives . . . . Employees must be induced; they must be induced to

engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person. Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited." *Local 1976, United Brotherhood of Carpenters* v. *Labor Board*, 357 U. S. 93, 98. See also *United Brotherhood of Carpenters (Wadsworth Building Co.)*, 81 N. L. R. B. 802, 805.

Important as is the distinction between legitimate "primary activity" and banned "secondary activity," it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade. See *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N. L. R. B. 547. "[I]ntended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers." *Seafarers International Union* v. *Labor Board*, 265 F. 2d 585, 590. "It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises." *Id.*, at 591. "Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success." *Local 294, supra*, at 890. But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck

employer. *Labor Board* v. *International Rice Milling, supra.*

However difficult the drawing of lines more nice than obvious, the statute compels the task. Accordingly, the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause. Although "[n]o rigid rule which would make . . . [a] few factors conclusive is contained in or deducible from the statute," *Sales Drivers* v. *Labor Board*, 229 F. 2d 514, 517,[3] "[i]n the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent." *Seafarers International Union, supra*, at 591.

The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way during the fourteen years in which it has had to apply § 8 (b)(4)(A), and has modified and reformed its standards on the basis of accumulating experience. "One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, 800.

II.

The early decisions of the Board following the Taft-Hartley amendments involved activity which took place around the secondary employer's premises. For example, in *Wadsworth Building Co., supra*, the union set up a picket line around the situs of a builder who had contracted to purchase prefabricated houses from the primary

[3] See also *Labor Board* v. *General Drivers, Local 968*, 225 F. 2d 205

employer. The Board found this to be illegal secondary activity. See also *Printing Specialties Union (Sealbright Pacific)*, 82 N. L. R. B. 271. In contrast, when picketing took place around the premises of the primary employer, the Board regarded this as valid primary activity. In *Oil Workers International Union (Pure Oil Co.)*, 84 N. L. R. B. 315, Pure had used Standard's dock and employees for loading its oil onto ships. The companies had contracted that, in case of a strike against Standard, Pure employees would take over the loading of Pure oil. The union struck against Standard and picketed the dock, and Pure employees refused to cross the picket line. The Board held this to be a primary activity, although the union's action induced the Pure employees to engage in a concerted refusal to handle Pure products at the dock. The fact that the picketing was confined to the vicinity of the Standard premises influenced the Board not to find that an object of the activity was to force Pure to cease doing business with Standard, even if such was a secondary effect.

> "A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is therefore proscribed by Section 8 (b)(4)(A) of the Act." 84 N. L. R. B., at 318.

See also *Newspaper & Mail Deliverers' Union (Interborough News Co.)*, 90 N. L. R. B. 2135; *International Brotherhood of Teamsters (Di Giorgio Wine Co.)*, 87 N. L. R. B. 720; *International Brotherhood of Teamsters (Rice Milling Co.)*, 84 N. L. R. B. 360.

In *United Electrical Workers (Ryan Construction Corp.)*, 85 N. L. R. B. 417, Ryan had contracted to perform construction work on a building adjacent to the Bucyrus plant and inside its fence. A separate gate was cut through the fence for Ryan's employees which no employee of Bucyrus ever used. The Board concluded that the union—on strike against Bucyrus—could picket the Ryan gate, even though an object of the picketing was to enlist the aid of Ryan employees, since Congress did not intend to outlaw primary picketing.

> "When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 other employees wish to enter the premises. It follows in this case that the picketing of Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus*, did not lose its character and become 'secondary' at the so-called Ryan gate because Ryan employees were the only persons regularly entering Bucyrus premises at that gate." 85 N. L. R. B., at 418. See also *General Teamsters (Crump, Inc.)*, 112 N. L. R. B. 311.

Thus, the Board eliminated picketing which took place around the situs of the primary employer—regardless of the special circumstances involved—from being held invalid secondary activity under § 8 (b)(4)(A).

However, the impact of the new situations made the Board conscious of the complexity of the problem by reason of the protean forms in which it appeared. This became clear in the "common situs" cases—situations where two employers were performing separate tasks on

common premises. The *Moore Dry Dock* case, *supra*, laid out the Board's new standards in this area. There, the union picketed outside an entrance to a dock where a ship, owned by the struck employer, was being trained and outfitted. Although the premises picketed were those of the secondary employer, they constituted the only place where picketing could take place; furthermore, the objectives of the picketing were no more aimed at the employees of the secondary employer—the dock owner—than they had been in the *Pure Oil* and *Ryan* cases. The Board concluded, however, that, when the situs of the primary employer was "ambulatory" there must be a balance between the union's right to picket and the interest of the secondary employer in being free from picketing. It set out four standards for picketing in such situations which would be presumptive of valid primary activity: (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer. These tests were widely accepted by reviewing federal courts. See, *e. g.*, *Labor Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65 (C. A. 2d Cir.); *Piezonki* v. *Labor Board*, 219 F. 2d 879 (C. A. 4th Cir.); *Labor Board* v. *Chauffeurs, Teamsters*, 212 F. 2d 216 (C. A. 7th Cir.); *Labor Board* v. *Local 55*, 218 F. 2d 226 (C. A. 10th Cir.). As is too often the way of law or, at least, of adjudications, soon the *Dry Dock* tests were mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity. For example, failure of picket signs clearly to designate the employer against whom the strike was directed was held to be violative of § 8 (b)(4)(A). See *Superior Derrick Corp.* v. *Labor Board*, 273 F. 2d 891; *Labor*

Board v. *Local 728*, 249 F. 2d 512; *Labor Board* v. *Local 728*, 228 F. 2d 791.[4]

In *Local 55 (PBM)*, 108 N. L. R. B. 363, the Board for the first time applied the *Dry Dock* test although the picketing occurred at premises owned by the primary employer. There, an insurance company owned a tract of land that it was developing, and also served as the general contractor. A neutral subcontractor was also doing work at the site. The union, engaged in a strike against the insurance company, picketed the entire premises, characterizing the entire job as unfair, and the employees of the subcontractor walked off. The Court of Appeals for the Tenth Circuit enforced the Board's order which found the picketing to be illegal on the ground that the picket signs did not measure up to the *Dry Dock* standard that they clearly disclose that the picketing was directed against the struck employer only. 218 F. 2d 226.

The Board's application of the *Dry Dock* standards to picketing at the premises of the struck employer was made more explicit in *Retail Fruit & Vegetable Clerks (Crystal Palace Market)*, 116 N. L. R. B. 856. The owner of a large common market operated some of the shops within, and leased out others to independent sellers. The union, although given permission to picket the owner's individual stands, chose to picket outside the entire market. The Board held that this action was violative of § 8 (b)(4)(A) in that the union did not attempt to minimize the effect of its picketing, as required in a common-situs case, on the operations of the neutral employers utilizing the market. "We believe . . . that the foregoing

---

[4] The *Dry Dock* criteria had perhaps their widest application in the trucking industry. There, unions on strike against truckers often staged picketing demonstrations at the places of pickup and delivery. Compare *International Brotherhood of Teamsters (Schultz Refrigerated Service, Inc.)*, 87 N. L. R. B. 502, with *International Brotherhood of Teamsters (Sterling Beverages, Inc.)*, 90 N. L. R. B. 401.

principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer." 116 N. L. R. B., at 859. The *Ryan* case, *supra*, was overruled to the extent it implied the contrary. The Court of Appeals for the Ninth Circuit, in enforcing the Board's order, specifically approved its disavowance of an ownership test. 249 F. 2d 591. The Board made clear that its decision did not affect situations where picketing which had effects on neutral third parties who dealt with the employer occurred at premises occupied solely by him. "In such cases, we adhere to the rule established by the Board . . . that more latitude be given to picketing at such separate primary premises than at premises occupied in part (or entirely) by secondary employers." 116 N. L. R. B., at 860, n. 10.

In rejecting the ownership test in situations where two employers were performing work upon a common site, the Board was naturally guided by this Court's opinion in *Rice Milling*, in which we indicated that the location of the picketing at the primary employer's premises was "not necessarily conclusive" of its legality. 341 U. S., at 671. Where the work done by the secondary employees is unrelated to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at property owned by the struck employer. The application of the *Dry Dock* tests to limit the picketing effects to the employees of the employer against whom the dispute is directed carries out the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *Labor Board* v. *Denver Building Council*, *supra*, at 692.

III.

From this necessary survey of the course of the Board's treatment of our problem, the precise nature of the issue before us emerges. With due regard to the relation between the Board's function and the scope of judicial review of its rulings, the question is whether the Board may apply the *Dry Dock* criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employers' premises. The effect of such a holding would not bar the union from picketing at all gates used by the employees, suppliers, and customers of the struck employer. Of course an employer may not, by removing all his employees from the situs of the strike, bar the union from publicizing its cause, see *Local 618* v. *Labor Board*, 249 F. 2d 332. The basis of the Board's decision in this case would not remotely have that effect, nor any such tendency for the future.

The Union claims that if the Board's ruling is upheld, employers will be free to erect separate gates for deliveries, customers, and replacement workers which will be immunized from picketing. This fear is baseless. The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings.[5] In such situations, the indicated limitations on picketing

---

[5] *United Steelworkers (Phelps Dodge Refining Corp.)*, 126 N. L. R. B. 1367; *International Chemical Workers Union (Virginia-Carolina Chemical Corp.)*, 126 N. L. R. B. 905; see *Union de Trabajadores (Gonzales Chemical Industries, Inc.)*, 128 N. L. R. B. No. 116.

activity respect the balance of competing interests that Congress has required the Board to enforce. On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations. The 1959 Amendments to the National Labor Relations Act, which removed the word "concerted" from the boycott provisions, included a proviso that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." 29 U. S. C. (Supp. I, 1959) § 158 (b)(4)(B). The proviso was directed against the fear that the removal of "concerted" from the statute might be interpreted so that "the picketing at the factory violates section 8 (b)(4)(A) because the pickets induce the truck driver employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike." Analysis of the bill prepared by Senator Kennedy and Representative Thompson, 105 Cong. Rec. 16589.

In a case similar to the one now before us, the Court of Appeals for the Second Circuit sustained the Board in its application of § 8 (b)(4)(A) to a separate-gate situation. "There must be a separate gate, marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations." *United Steelworkers* v. *Labor Board*, Doc. No. 26252, decided May 3, 1961. These seem to us controlling considerations.

IV.

The foregoing course of reasoning would require that the judgment below sustaining the Board's order be affirmed but for one consideration, even though this consideration may turn out not to affect the result. The legal path by which the Board and the Court of Appeals reached their decisions did not take into account that if Gate 3–A was in fact used by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a mingled one outside the bar of § 8 (b)(4)(A). In short, such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees. While the record shows some such mingled use, it sheds no light on its extent. It may well turn out to be that the instances of these maintenance tasks were so insubstantial as to be treated by the Board as *de minimis*. We cannot here guess at the quantitative aspect of this problem. It calls for Board determination. For determination of the questions thus raised, the case must be remanded by the Court of Appeals to the Board.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BLACK concur in the result.

SUPREME COURT OF THE UNITED STATES

No. 321.—October Term, 1960.

Local 761, International Union of Electrical, Radio and Machine Workers, AFL–CIO, Petitioner, v. National Labor Relations Board, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1961.]

Mr. Justice Douglas.

I did not vote to grant certiorari in this case because it seemed to me that the problem presented was in the keeping of the Courts of Appeals within the meaning of *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 490. Since the Court of Appeals followed the guide lines of that case (see 278 F. 2d 282, 286), I would leave the decision with it. I cannot say it made any egregious error, though I might have decided the case differently had I sat on the Labor Board or on the Court of Appeals.